

No. 15447

United States
Court of Appeals
For the Ninth Circuit

GRACE M. POWELL, Executrix of the Estate of
O. E. Powell, Deceased,

Appellant,

vs.

RALPH C. GRANQUIST, District Director of
Internal Revenue,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILE

JUN 11 1957

PAUL P. O'BRIEN, C

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

Civil No. 7837

GRACE M. POWELL, Executrix of the Estate of
O. E. POWELL, Deceased,

Plaintiff,

vs.

RALPH C. GRANQUIST, District Director of
Internal Revenue,

Defendant.

COMPLAINT

Comes Now the Plaintiff and for her first cause of action against the Defendant, complains and alleges as follows:

I.

That this is a Civil action and arises under the laws of the United States of America providing for Internal Revenue, and jurisdiction rests upon Title 28, United States Code, Sec. 1340.

II.

That O. E. Powell was, until his death on or about July 16, 1954, and at all times mentioned herein, a citizen and resident of Multnomah County, State of Oregon, and the United States.

III.

That the Plaintiff is the duly appointed and qualified Executrix of the estate of O. E. Powell, deceased, and was so appointed by the Circuit Court

of the County of Multnomah, State of Oregon, Probate Department, on or about September 21, 1954.

IV.

That the Defendant is the duly appointed and qualified District Director of Internal Revenue and was so appointed on or about October 31, 1952.

V.

That on or about September 25, 1950, the Commissioner of Internal Revenue mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for the taxable year ended December 31, 1937, in the following amounts: Deficiency, \$100.99; Section 293(b), Internal Revenue Code penalty, \$50.50; and Section 291(a), Internal Revenue Code, penalty in the amount of \$25.25.

VI.

That the Commissioner explained in the aforementioned letter that the aforementioned deficiency was due to fraud with intent to evade tax within the meaning of Section 293(b), Internal Revenue Code, and therefore imposed said penalty for the taxable year ended December 31, 1937.

VII.

That the Commissioner explained in the aforementioned letter that the taxpayer, O. E. Powell, had failed to file timely income tax returns and therefore imposed the penalties as provided in Sec-

tion 291(a), Internal Revenue Code, for the taxable year ended December 31, 1937.

VIII.

That no part of the aforementioned deficiency for the taxable year ended December 31, 1937, was due to fraud with intent to evade the tax within the meaning of Section 293(b), Internal Revenue Code. (Section 6653(b), Internal Revenue Code of 1954.)

IX.

That the taxpayer's, O. E. Powell, failure to file timely income tax returns for the taxable year ended December 31, 1937, was due to reasonable cause and not due to wilful neglect within the meaning of Section 291(a), Internal Revenue Code (Section 6651, Internal Revenue Code of 1954).

X.

That thereafter the taxes and penalties mentioned above were wrongfully, erroneously and arbitrarily assessed and the penalties mentioned above were wrongfully, erroneously and arbitrarily collected by the Defendant during the month of April, 1954, for the taxable year ended December 31, 1937.

XI.

That thereafter on or about July 13, 1954, the taxpayer, O. E. Powell, duly filed a claim for refund of said taxes for the taxable year ended December 31, 1937, and a copy of said claim is attached hereto, marked "Exhibit A," and by this reference is made a part hereof.

XII.

That thereafter by registered mail the Defendant mailed to O. E. Powell a letter bearing the date of October 7, 1954, and mailed October 11, 1954, notifying O. E. Powell that his claim for refund had been rejected for the year 1937, and a copy of said letter is attached hereto, marked "Exhibit B," and by this reference is made a part hereof.

XIII.

That there is now due and owing by the Defendant to the Plaintiff the sum of \$75.75 together with interest as provided by law and that the Defendant is wrongfully, erroneously and arbitrarily withholding said amounts as penalties, as aforementioned, for the taxable year ended December 31, 1937.

For a Second Cause of Action Against the Defendant, the Plaintiff Complains and Alleges as Follows:

I.

Realleges Paragraphs I to IV, inclusive, of her first cause of action.

II.

That on or about September 25, 1950, the Commissioner of Internal Revenue mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for the taxable year ended December 31, 1938, in the following amounts: Deficiency, \$102.10; Section 293(b), Internal Revenue Code penalty, \$51.05; and Section 291(a), In-

ternal Revenue Code penalty in the amount of \$25.23.

III.

That the Commissioner explained in the aforementioned letter that the aforementioned deficiency was due to fraud with intent to evade tax within the meaning of Section 293(b), Internal Revenue Code, and therefore imposed said penalty as therein provided for the taxable year ended December 31, 1938.

IV.

That the Commissioner explained in the aforementioned letter that the taxpayer, O. E. Powell, had failed to file timely income tax returns and therefore imposed the penalties as provided in Section 291(a), Internal Revenue Code, for the taxable year ended December 31, 1938.

V.

That no part of the aforementioned deficiency for the taxable year ended December 31, 1938, was due to fraud with intent to evade the tax within the meaning of Section 293(b), Internal Revenue Code. (Section 6653(b), Internal Revenue Code of 1954.)

VI.

That the taxpayer's, O. E. Powell, failure to file timely income tax returns for the taxable year ended December 31, 1938, was due to reasonable cause and not due to wilful neglect within the meaning of Section 291(a), Internal Revenue Code. (Section 6651, Internal Revenue Code of 1954.)

VII.

That thereafter the taxes and penalties mentioned above were wrongfully, erroneously and arbitrarily assessed and the penalties mentioned above were wrongfully, erroneously and arbitrarily collected by the Defendant during the month of April, 1954, for the taxable year ended December 31, 1938.

VIII.

That thereafter on or about July 13, 1954, the taxpayer, O. E. Powell, duly filed a claim for refund of said taxes for the taxable year ended December 31, 1938, and a copy of said claim is attached hereto, marked "Exhibit C," and by this reference is made a part hereof.

IX.

That thereafter by registered mail the Defendant mailed to O. E. Powell a letter bearing the date of October 7, 1954, and mailed October 11, 1954, notifying O. E. Powell that his claim for refund had been rejected for the year 1938, and a copy of said letter is attached hereto, marked "Exhibit D," and by this reference is made a part hereof.

X.

That there is now due and owing by the Defendant to the Plaintiff the sum of \$76.28 together with interest as provided by law and that the Defendant is wrongfully, erroneously and arbitrarily withholding said amounts as penalties, as aforementioned, for the taxable year ended December 31, 1938.

For a Third Cause of Action Against the Defendant, the Plaintiff Complains and Alleges as Follows:

I.

Realleges Paragraphs I to IV, inclusive, of her first cause of action.

II.

That on or about September 25, 1950, the Commissioner of Internal Revenue mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for the taxable year ended December 31, 1939, in the following amounts: Deficiency, \$76.82; Section 293(b), Internal Revenue Code penalty, \$38.41; and Section 291(a), Internal Revenue Code, penalty in the amount of \$19.21.

III.

That the Commissioner explained in the aforementioned letter that the aforementioned deficiency was due to fraud with intent to evade tax within the meaning of Section 293(b), Internal Revenue Code, and therefore imposed said penalty as therein provided for the taxable year ended December 31, 1939.

IV.

That the Commissioner explained in the aforementioned letter that the taxpayer, O. E. Powell, had failed to file timely income tax returns and therefore imposed the penalties as provided in Section 291(a), Internal Revenue Code, for the taxable year ended December 31, 1939.

V.

That no part of the aforementioned deficiency for the taxable year ended December 31, 1939, was due to fraud with intent to evade the tax within the meaning of Section 293(b), Internal Revenue Code. (Section 6653(b), Internal Revenue Code of 1954.)

VI.

That the taxpayer's, O. E. Powell, failure to file timely income tax returns for the taxable year ended December 31, 1939, was due to reasonable cause and not due to wilful neglect within the meaning of Section 291(a), Internal Revenue Code. (Section 6651, Internal Revenue Code of 1954.)

VII.

That thereafter the taxes and penalties mentioned above were wrongfully, erroneously and arbitrarily assessed and the penalties mentioned above were wrongfully, erroneously and arbitrarily collected by the Defendant during the month of April, 1954, for the taxable year ended December 31, 1939.

VIII.

That thereafter on or about July 13, 1954, the taxpayer, O. E. Powell, duly filed a claim for refund of said taxes for the taxable year ended December 31, 1939, and a copy of said claim is attached hereto, marked "Exhibit E," and by this reference is made a part hereof.

IX.

That thereafter by registered mail the Defendant mailed to O. E. Powell a letter bearing the date

of October 7, 1954, and mailed October 11, 1954, notifying O. E. Powell that his claim for refund had been rejected for the year 1939, and a copy of said letter is attached hereto, marked "Exhibit F," and by this reference is made a part hereof.

X.

That there is now due and owing by the Defendant to the Plaintiff the sum of \$57.62, together with interest as provided by law and that the Defendant is wrongfully, erroneously and arbitrarily withholding said amounts as penalties, as aforementioned, for the taxable year ended December 31, 1939.

For a Fourth Cause of Action Against the Defendant, the Plaintiff Complains and Alleges as Follows:

I.

Realleges Paragraphs I to IV, inclusive, of her first cause of action.

II.

That on or about September 25, 1950, the Commissioner of Internal Revenue mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for the taxable year ended December 31, 1940, in the following amounts: Deficiency, \$590.16; Section 293(b), Internal Revenue Code penalty, \$295.08; and Section 291(a), Internal Revenue Code penalty in the amount of \$147.54.

III.

That the Commissioner explained in the aforementioned letter that the aforementioned deficiency was due to fraud with intent to evade tax within the meaning of Section 293(b), Internal Revenue Code, and therefore imposed said penalty as therein provided for the taxable year ended December 31, 1940.

IV.

That the Commissioner explained in the aforementioned letter that the taxpayer, O. E. Powell, had failed to file timely income tax returns and therefore imposed the penalties as provided in Section 291(a), Internal Revenue Code, for the taxable year ended December 31, 1940.

V.

That no part of the aforementioned deficiency for the taxable year ended December 31, 1940, was due to fraud with intent to evade the tax within the meaning of Section 293(b), Internal Revenue Code. (Section 6653(b), Internal Revenue Code of 1954.)

VI.

That the taxpayer's, O. E. Powell, failure to file timely income tax returns for the taxable year ended December 31, 1940, was due to reasonable cause and not due to wilful neglect within the meaning of Section 291(a), Internal Revenue Code. (Section 6651, Internal Revenue Code of 1954.)

VII.

That thereafter the taxes and penalties mentioned above were wrongfully, erroneously and arbitrarily

assessed and the penalties mentioned above were wrongfully, erroneously and arbitrarily collected by the Defendant during the month of April, 1954, for the taxable year ended December 31, 1940.

VIII.

That thereafter on or about July 13, 1954, the taxpayer, O. E. Powell, duly filed a claim for refund of said taxes for the taxable year ended December 31, 1940, and a copy of said claim is attached hereto, marked "Exhibit G," and by this reference is made a part hereof.

IX.

That thereafter by registered mail the Defendant mailed to O. E. Powell a letter bearing the date of October 7, 1954, and mailed October 11, 1954, notifying O. E. Powell that his claim for refund had been rejected for the year 1940, and a copy of said letter is attached hereto, marked "Exhibit H," and by this reference is made a part hereof.

X.

That there is now due and owing by the Defendant to the Plaintiff the sum of \$442.62, together with interest as provided by law and that the Defendant is wrongfully, erroneously and arbitrarily withholding said amounts as penalties, as aforementioned, for the taxable year ended December 31, 1940.

For a Fifth Cause of Action Against the Defendant, the Plaintiff Complains and Alleges as Follows:

I.

Realleges Paragraphs I to IV, inclusive, for her first cause of action.

II.

That on or about September 25, 1950, the Commissioner of Internal Revenue mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for the taxable year ended December 31, 1941, in the following amounts: Deficiency, \$1,027.81; Section 293(b), Internal Revenue Code penalty, \$513.91; and Section 291(a), Internal Revenue Code penalty in the amount of \$256.95.

III.

That the Commissioner explained in the aforementioned letter that the aforementioned deficiency was due to fraud with intent to evade tax within the meaning of Section 293(b), Internal Revenue Code, and therefore imposed said penalty as therein provided for the taxable year ended December 31, 1941.

IV.

That the Commissioner explained in the aforementioned letter that the taxpayer, O. E. Powell, had failed to file timely income tax returns and therefore imposed the penalties as provided in Section 291(a), Internal Revenue Code, for the taxable year ended December 31, 1941.

V.

That no part of the aforementioned deficiency for the taxable year ended December 31, 1941, was due to fraud with intent to evade the tax within the meaning of Section 293(b), Internal Revenue Code. (Section 6653(b), Internal Revenue Code of 1954.)

VI.

That the taxpayer's, O. E. Powell, failure to file timely income tax returns for the taxable year ended December 31, 1941, was due to reasonable cause and not due to wilful neglect within the meaning of Section 291(a), Internal Revenue Code. (Section 6651, Internal Revenue Code of 1954.)

VII.

That thereafter the taxes and penalties mentioned above were wrongfully, erroneously and arbitrarily assessed and the penalties mentioned above were wrongfully, erroneously and arbitrarily collected by the Defendant during the month of April, 1954, for the taxable year ended December 31, 1941.

VIII.

That thereafter on or about July 13, 1954, the taxpayer, O. E. Powell, duly filed a claim for refund of said taxes for the taxable year ended December 31, 1941, and a copy of said claim is attached hereto, marked "Exhibit I," and by this reference is made a part hereof.

IX.

That thereafter by registered mail the Defendant mailed to O. E. Powell a letter bearing the date of

October 7, 1954, and mailed October 11, 1954, notifying O. E. Powell that his claim for refund had been rejected for the year 1941, a copy of said letter being attached hereto, marked "Exhibit J," and by this reference is made a part hereof.

X.

That there is now due and owing by the Defendant to the Plaintiff the sum of \$770.86 together with interest as provided by law and that the Defendant is wrongfully, erroneously and arbitrarily withholding said amounts as penalties, as aforementioned, for the taxable year ended December 31, 1941.

For a Sixth Cause of Action Against the Defendant, the Plaintiff Complains and Alleges as Follows:

I.

Realleges Paragraphs I to IV, inclusive, of her first cause of action.

II.

That on or about September 25, 1950, the Commissioner of Internal Revenue mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for the taxable year ended December 31, 1942, in the following amounts: Deficiency, \$3,853.66; Section 293(b), Internal Revenue Code penalty, \$1,926.83; and Section 291(a), Internal Revenue Code penalty in the amount of \$963.42.

III.

That the Commissioner explained in the aforementioned letter that the aforementioned deficiency was due to fraud with intent to evade tax within the meaning of Section 293(b), Internal Revenue Code, and therefore imposed said penalty as therein provided for the taxable year ended December 31, 1942.

IV.

That the Commissioner explained in the aforementioned letter that the taxpayer, O. E. Powell, had failed to file timely income tax returns and therefore imposed the penalties as provided in Section 291(a), Internal Revenue Code, for the taxable year ended December 31, 1942.

V.

That no part of the aforementioned deficiency for the taxable year ended December 31, 1942, was due to fraud with intent to evade the tax within the meaning of Section 293(b), Internal Revenue Code. (Section 6653(b), Internal Revenue Code of 1954.)

VI.

That the taxpayer's, O. E. Powell, failure to file timely income tax returns for the taxable year ended December 31, 1942, was due to reasonable cause and not due to wilful neglect within the meaning of Section 291 (a), Internal Revenue Code. (Section 6651, Internal Revenue Code of 1954.)

VII.

That thereafter the taxes and penalties mentioned above were wrongfully, erroneously and arbitrarily assessed and the penalties mentioned above were wrongfully, erroneously and arbitrarily collected by the Defendant during the month of April, 1954, for the taxable year ended December 31, 1942.

VIII.

That thereafter on or about July 13, 1954, the taxpayer, O. E. Powell, duly filed a claim for refund of said taxes for the taxable year ended December 31, 1942, and a copy of said claim is attached hereto, marked "Exhibit K," and by this reference is made a part hereof.

IX.

That thereafter by registered mail the Defendant mailed to O. E. Powell a letter bearing the date of October 7, 1954, and mailed October 11, 1954, notifying O. E. Powell that his claim for refund had been rejected for the year 1942, and a copy of said letter is attached hereto, marked "Exhibit L," and by this reference is made a part hereof.

X.

That there is now due and owing by the Defendant to the Plaintiff the sum of \$2,890.25 together with interest as provided by law and that the Defendant is wrongfully, erroneously and arbitrarily withholding said amounts as penalties, as aforementioned, for the taxable year ended December 31, 1942.

For a Seventh Cause of Action Against the Defendant, the Plaintiff Complains and Alleges as Follows:

I.

Realleges Paragraphs I to IV, inclusive, of her first cause of action.

II.

That on or about September 25, 1950, the Commissioner of Internal Revenue mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for the taxable year ended December 31, 1943, in the following amounts: Deficiency, \$2,520.25; Section 293 (b), Internal Revenue Code penalty, \$1,260.13; Section 291 (a), Internal Revenue Code penalty in the amount of \$630.06; and Section 294 (d) (1) (A) and (B), Internal Revenue Code penalty in the amount of \$403.25.

III.

That the Commissioner explained in the aforementioned letter that the aforementioned deficiency was due to fraud with intent to evade tax within the meaning of Section 293 (b), Internal Revenue Code, and therefore imposed said penalty as therein provided for the taxable year ended December 31, 1943.

IV.

That the Commissioner explained in the aforementioned letter that the taxpayer, O. E. Powell, had failed to file timely income tax returns and therefore imposed the penalties as provided in Sec-

tion 291(a), Internal Revenue Code, for the taxable year ended December 31, 1943.

V.

That the Commissioner explained that the taxpayer, O. E. Powell, had failed to file a declaration of estimated tax and had failed to pay installments of estimated tax declared for such years and therefore asserted the penalties as provided for by Sections 294 (d) (1) (A) and (B), Internal Revenue Code, for the taxable year ended December 31, 1943.

VI.

That no part of the aforementioned deficiency for the taxable year ended December 31, 1943, was due to fraud with intent to evade the tax within the meaning of Section 293 (b), Internal Revenue Code. (Section 6653 (b), Internal Revenue Code of 1954.)

VII.

That the taxpayer's, O. E. Powell, failure to file timely income tax returns for the taxable year ended December 31, 1943, was due to reasonable cause and not due to wilful neglect within the meaning of Section 291 (a), Internal Revenue Code (Section 6651, Internal Revenue Code of 1954.)

VIII.

That the taxpayer's, O. E. Powell, failure to file a declaration of estimated tax and pay installments thereon was due to reasonable cause and not to wilful neglect within the meaning of Sections 294 (d) (1) (A) and (B), Internal Revenue Code, and that

the latter penalty does not in any event apply for the taxable year ended December 31, 1943.

IX.

That thereafter the taxes and penalties mentioned above were wrongfully, erroneously and arbitrarily assessed and the penalties mentioned above were wrongfully, erroneously and arbitrarily collected by the Defendant during the month of April, 1954, for the taxable year ended December 31, 1943.

X.

That thereafter on or about July 13, 1954, the taxpayer, O. E. Powell, duly filed a claim for refund of said taxes for the taxable year ended December 31, 1943, and a copy of said claim is attached hereto, marked "Exhibit M," and by this reference is made a part hereof.

XI.

That thereafter by registered mail the Defendant mailed to O. E. Powell a letter bearing the date of October 7, 1954, and mailed October 11, 1954, notifying O. E. Powell that his claim for refund had been rejected for the year 1943, and a copy of said letter is attached hereto, marked "Exhibit N," and by this reference is made a part hereof.

XII.

That there is now due and owing by the Defendant to the Plaintiff the sum of \$2,293.44 together with interest as provided by law and that the Defendant is wrongfully, erroneously and arbitrarily withholding said amounts as penalties, as afore-

mentioned for the taxable year ended December 31, 1943.

For an Eighth Cause of Action Against the Defendant, the Plaintiff Complains and Alleges as Follows:

I.

Realleges Paragraphs I to IV, inclusive, of her first cause of action.

II.

That on or about September 25, 1950, the Commissioner of Internal Revenue mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for the taxable year ended December 31, 1944, in the following amounts: Deficiency, \$11,426.55; Section 293 (b), Internal Revenue Code penalty, \$5,713.28; Section 291 (a), Internal Revenue Code penalty in the amount of \$2,856.64; and Section 294 (d) (1) (A) and (B), Internal Revenue Code, penalty in the amount of \$1,828.25.

III.

That the Commissioner explained in the aforementioned letter that the aforementioned deficiency was due to fraud with intent to evade tax within the meaning of Section 293 (b), Internal Revenue Code, and therefore imposed said penalty as therein provided for the taxable year ended December 31, 1944.

IV.

That the Commissioner explained in the aforementioned letter that the taxpayer, O. E. Powell,

had failed to file timely income tax returns and therefore imposed the penalties as provided in Section 291 (a), Internal Revenue Code, for the taxable year ended December 31, 1944.

V.

That the Commissioner explained that the taxpayer, O. E. Powell, had failed to file a declaration of estimated tax and had failed to pay installments of estimated tax declared for such years and therefore asserted the penalties as provided for by Sections 294 (d) (1) (A) and (B), Internal Revenue Code, for the taxable year ended December 31, 1944.

VI.

That no part of the aforementioned deficiency for the taxable year ended December 31, 1944, was due to fraud with intent to evade the tax within the meaning of Section 293 (b), Internal Revenue Code. (Section 6653 (b), Internal Revenue Code of 1954.)

VII.

That the taxpayer's, O. E. Powell, failure to file timely income tax returns for the taxable year ended December 31, 1944, was due to reasonable cause and not due to wilful neglect within the meaning of Section 291 (a), Internal Revenue Code. (Section 6651, Internal Revenue Code of 1954.)

VIII.

That the taxpayer's, O. E. Powell, failure to file a declaration of estimated tax and pay installments thereon was due to reasonable cause and not to

wilful neglect within the meaning of Sections 294 (d) (1) (A) and (B), Internal Revenue Code, and that the latter penalty does not in any event apply for the taxable year ended December 31, 1944.

IX.

That thereafter the taxes and penalties mentioned above were wrongfully, erroneously and arbitrarily assessed and the penalties mentioned above were wrongfully, erroneously and arbitrarily collected by the Defendant during the month of April, 1954, for the taxable year ended December 31, 1944.

X.

That thereafter on or about July 13, 1954, the taxpayer, O. E. Powell, duly filed a claim for refund of said taxes for the taxable year ended December 31, 1944, and a copy of said claim is attached hereto, marked "Exhibit O," and by this reference is made a part hereof.

XI.

That thereafter by registered mail the Defendant mailed to O. E. Powell a letter bearing the date of October 7, 1954, and mailed October 11, 1954, notifying O. E. Powell that his claim for refund had been rejected for the year 1944, and a copy of said letter is attached hereto, marked "Exhibit P," and by this reference is made a part hereof.

XII.

That there is now due and owing by the Defendant to the Plaintiff the sum of \$10,398.17 together with interest as provided by law and that the De-

defendant is wrongfully, erroneously and arbitrarily withholding said amounts as penalties as aforementioned for the taxable year ended December 31, 1944.

For a Ninth Cause of Action Against the Defendant, the Plaintiff Complains and Alleges as Follows:

I.

Realleges Paragraphs I to IV, inclusive, of her first cause of action.

II.

That on or about September 25, 1950, the Commissioner of Internal Revenue mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for the taxable year ended December 31, 1945, in the following amounts: Deficiency, \$6,062.40; Section 293 (b), Internal Revenue Code penalty, \$3,031.20; Section 291 (a), Internal Revenue Code, penalty in the amount of \$1,515.60; and Section 294 (d) (1) (A) and (B), Internal Revenue Code penalty in the amount of \$969.98.

III.

That the Commissioner explained in the aforementioned letter that the aforementioned deficiency was due to fraud with intent to evade tax within the meaning of Section 293 (b), Internal Revenue Code, and therefore imposed said penalty as therein provided for the taxable year ended December 31, 1945.

IV.

That the Commissioner explained in the aforementioned letter that the taxpayer, O. E. Powell, had failed to file timely income tax returns and therefore imposed the penalties as provided in Section 291 (a), Internal Revenue Code, for the taxable year ended December 31, 1945.

V.

That the Commissioner explained that the taxpayer, O. E. Powell, had failed to file a declaration of estimated tax and had failed to pay installments of estimated tax declared for such years and therefore asserted the penalties as provided for by Sections 294 (d) (1) (A) and (B), Internal Revenue Code, for the taxable years ended December 31, 1945.

VI.

That no part of the aforementioned deficiency for the taxable year ended December 31, 1945, was due to fraud with intent to evade the tax within the meaning of Section 293 (b), Internal Revenue Code. (Section 6653 (b), Internal Revenue Code of 1954.)

VII.

That the taxpayer's, O. E. Powell, failure to file timely income tax returns for the taxable year ended December 31, 1945, was due to reasonable cause and not due to wilful neglect within the meaning of Section 291 (a), Internal Revenue Code. (Section 6651, Internal Revenue Code of 1954.)

VIII.

That the taxpayer's, O. E. Powell, failure to file a declaration of estimated tax and pay installments thereon was due to reasonable cause and not to wilful neglect within the meaning of Sections 294 (d) (1) (A) and (B), Internal Revenue Code, and that the latter penalty does not in any event apply for the taxable year ended December 31, 1945.

IX.

That thereafter the taxes and penalties mentioned above were wrongfully, erroneously and arbitrarily assessed and the penalties mentioned above were wrongfully, erroneously and arbitrarily collected by the Defendant during the month of April, 1954, for the taxable years ended December 31, 1945.

X.

That thereafter on or about July 13, 1954, the taxpayer, O. E. Powell, duly filed a claim for refund of said taxes for the taxable year ended December 31, 1945, and a copy of said claim is attached hereto, marked "Exhibit Q," and by this reference is made a part hereof.

XI.

That thereafter by registered mail the Defendant mailed to O. E. Powell a letter bearing the date of October 7, 1954, and mailed October 11, 1954, notifying O. E. Powell that his claim for refund had been rejected for the year 1945, and a copy of said letter is attached hereto, marked "Exhibit R," and by this reference is made a part hereof.

XII.

That there is now due and owing by the Defendant to the Plaintiff the sum of \$5,516.78 together with interest as provided by law and that the Defendant is wrongfully, erroneously and arbitrarily withholding said amounts as penalties as aforementioned for the taxable year ended December 31, 1945.

Wherefore, the Plaintiff demands judgment against the Defendant for the sum of \$22,521.77 together with interest from the date of payment of said sum, and costs.

/s/ ARTHUR D. JONES,
HUMPHREYS & JONES,
Attorneys for Plaintiff.

Duly verified.

“EXHIBIT A”

(Copy)

Form 843
U. S. Treasury Department
Internal Revenue Service

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

District Director's Stamp (Date received): [Blank]

Name of taxpayer or purchaser of stamps:

O. E. Powell.

Street address: 3603 N. E. Klickitat.

City, postal zone number, and State:

Portland, Oregon.

1. District in which return (if any) was filed: Oregon.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1937, to Dec. 31, 1937.
3. Kind of tax: Income Tax.
4. Amount of assessment, \$176.74; dates of payment, various (penalties only).

* * *

6. Amount to be refunded: \$75.75.*

* * *

The claimant believes that this claim should be allowed for the following reasons:

*Together with interest from date of payment as provided by law.

The commissioner of Internal Revenue assessed a deficiency in income taxes for the calendar year ended December 31, 1937, in the amount of \$100.99 and determined penalties pursuant to Section 293 (b) L.R.C. in the amount of \$50.50 and penalties pursuant Section 291 (a) I.R.C. in the amount of \$25.25.

That no part of said deficiency was due to fraud with intent to evade the tax within the meaning of Section 293 (b) I.R.C.

That the taxpayer's failure to file a timely return (Form 1040) was due to reasonable cause and not due to wilful neglect.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ O. E. POWELL.

Dated May 27, 1954.

“EXHIBIT B”

(Copy)

U. S. Treasury Department
Office of the Director of Internal Revenue
830 N. E. Holladay
Portland 14, Ore.

Oct. 7, 1954.

In replying refer to: C:A:CL

Mr. O. E. Powell,
4805 S. W. Sunset Rd.,
Portland, Ore.

Dear Mr. Powell:

In re: Claim for refund of Income Tax,
\$75.75 for the period 1937.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,

/s/ R. C. GRANQUIST,
District Director.

"EXHIBIT C"

(Copy)

Form 843

U. S. Treasury Department

Internal Revenue Service

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

District Director's Stamp (Date received): [Blank]

Name of taxpayer or purchaser of stamps:

O. E. Powell.

Street address: 3603 N. E. Klickitat.

City, postal zone number, and State:

Portland, Oregon.

1. District in which return (if any) was filed:
Oregon.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from
January 1, 1938, to Dec. 31, 1938.

3. Kind of tax: Income taxes and penalties.
4. Amount of assessment, \$178.38; dates of payment, various (penalties only).

* * *

6. Amount to be refunded, \$76.28.*

* * *

The claimant believes that this claim should be allowed for the following reasons:

That the Commissioner of Internal Revenue assessed a deficiency in income taxes for the calendar year 1938 in the amount of \$102.10 and determined penalties pursuant to Section 293 (b) I.R.C. in the amount of \$51.05 and penalties pursuant to Section 291 (a) I.R.C. in the amount of \$25.23.

That no part of said deficiency was due to fraud with intent to evade the tax within the meaning of Section 293 (b) I.R.C.

That the taxpayer's failure to file a timely return (Form 1040) was due to reasonable cause and not due to wilful neglect.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ O. E. POWELL.

Dated May 27, 1954.

*Together with interest from date of payment as provided by law.

"EXHIBIT D"

(Copy)

U. S. Treasury Department
Office of the Director of Internal Revenue
830 N. E. Holladay
Portland 14, Ore.

Oct. 7, 1954.

In replying refer to: C:A:CL

Mr. O. E. Powell,
4805 S. W. Sunset Rd.,
Portland, Ore.

Dear Mr. Powell:

In re: Claim for refund of Income Tax,
\$76.28 for the period year 1938.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,

/s/ R. C. GRANQUIST,
District Director.

“EXHIBIT E”

(Copy)

Form 843

U. S. Treasury Department
Internal Revenue Service

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

District Director's Stamp (Date received): [Blank]

Name of taxpayer or purchaser of stamps:
O. E. Powell.

Street address: 3603 N. E. Klickitat.

City, postal zone number, and State:
Portland, Oregon.

1. District in which return (if any) was filed:
Oregon.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1939, to Dec. 31, 1939.
3. Kind of tax: Income tax and penalties.
4. Amount of assessment, \$134.44; dates of payment, various (penalties only.)

* * *

6. Amount to be refunded: \$57.62.*

* * *

The claimant believes that this claim should be allowed for the following reasons:

That the Commissioner of Internal Revenue assessed a deficiency in income taxes for the calendar year ended December 31, 1939, in the amount of \$76.82 and determined penalties pursuant to Section 293 (b) I.R.C. in the amount of \$38.41 and penalties pursuant to Section 291 (a) I.R.C. in the amount of \$19.21.

That no part of said deficiency was due to fraud with intent to evade the tax within the meaning of Section 293 (b) I.R.C.

That the taxpayer's failure to file a timely return (Form 1040) was due to reasonable cause and not due to wilful neglect.

I declare under the penalties of perjury that this claim (including any accompanying schedules and

*Together with interest from date of payment as provided by law.

statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ O. E. POWELL.

Dated May 27, 1954.

“EXHIBIT F”

(Copy)

U. S. Treasury Department
Office of the Director of Internal Revenue
830 N. E. Holladay
Portland 14, Ore.

Oct. 7, 1954.

In replying refer to: C:A:CL

Mr. O. E. Powell,
4805 S. W. Sunset Rd.,
Portland, Ore.

Dear Mr. Powell:

In re: Claim for refund of Income Tax,
Amount \$57.62 for the period year
1939.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,

/s/ R. C. GRANQUIST,
District Director.

“EXHIBIT G”

(Copy)

Form 843

U. S. Treasury Department
Internal Revenue Service

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

District Director's Stamp (Date received): [Blank]

Name of taxpayer or purchaser of stamps:

O. E. Powell.

Street address: 3603 N. E. Klickitat.

City, postal zone number, and State:

Portland, Oregon.

1. District in which return (if any) was filed:
Oregon.
2. Period (if for tax reported on annual basis,
prepare separate form for each taxable year)
from Jan. 1, 1940, to Dec. 31, 1940.
3. Kind of tax: Income tax and penalties.
4. Amount of assessment, \$1,032.78; dates of pay-
ment, various (penalties only).

* * *

6. Amount to be refunded: \$442.62.*

* * *

The claimant believes that this claim should be allowed for the following reasons:

That the Commissioner of Internal Revenue assessed a deficiency in income taxes for the calendar year ended December 31, 1940, in the amount of \$590.16 and determined penalties pursuant to 293 (b) I.R.C. in the amount of \$295.08 and penalties pursuant to Section 291 (a) I.R.C. in the amount of \$147.54.

That no part of said deficiency was due to fraud with intent to evade the tax within the meaning of Section 293 (b) I.R.C.

*Together with interest from date of payment as provided by law.

That the taxpayer's failure to file a timely return (Form 1040) was due to reasonable cause and not due to wilful neglect.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ O. E. POWELL.

Dated May 27, 1954.

“EXHIBIT H”

(Copy)

U. S. Treasury Department
Office of the Director of Internal Revenue
830 N. E. Holladay
Portland 14, Ore.

Oct. 7, 1954.

In replying refer to: C:A:CL

Mr. O. E. Powell,
4805 S. W. Sunset Rd.,
Portland, Ore.

Dear Mr. Powell:

In re: Claim for refund of Income Tax,
\$442.62 for the period year 1940.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this

notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,

/s/ R. C. GRANQUIST,
District Director.

“EXHIBIT I”

(Copy)

Form 843

U. S. Treasury Department
Internal Revenue Service

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

District Director's Stamp (Date received): [Blank]

Name of Taxpayer or purchaser of stamps:
O. E. Powell.

Street address: 3603 N. E. Klickitat.

City, postal zone number, and State:
Portland, Oregon.

1. District in which return (if any) was filed:
Oregon.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1941, to Dec. 31, 1941.
3. Kind of tax: Income tax and penalties.
4. Amount of assessment, \$1,798.67; dates of payment, various (penalties only).

* * *

6. Amount to be refunded: \$770.86.*

* * *

The claimant believes that this claim should be allowed for the following reasons:

That the Commissioner of Internal Revenue assessed a deficiency in income taxes for the calendar year ended December 31, 1941, in the amount of \$1,027.81 and determined penalties pursuant to section 293 (b) I.R.C. in the amount of \$513.91 and penalties pursuant to Section 291 (a) I.R.C. in the amount of \$256.95.

That no part of said deficiency was due to fraud with intent to evade the tax within the meaning of Section 293 (b) I.R.C.

*Together with interest from date of payment as provided by law.

That the taxpayer's failure to file a timely return (Form 1040) was due to reasonable cause and not due to wilful neglect.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ O. E. POWELL.

Dated May 27, 1954.

“EXHIBIT J”

(Copy)

U. S. Treasury Department
Office of the Director of Internal Revenue
830 N. E. Holladay
Portland 14, Ore.

Oct. 7, 1954.

In replying refer to: C:A:CL

Mr. O. E. Powell,
4805 S. W. Sunset Rd.,
Portland, Ore.

Dear Mr. Powell:

In re: Claim for refund of Income Tax,
\$770.86 for the period year 1941.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this

notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,

/s/ R. C. GRANQUIST,
District Director.

“EXHIBIT K”

(Copy)

Form 843

U. S. Treasury Department
Internal Revenue Service

Claim

To Be Filed With the District Director Where
Assessment was made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

District Director's Stamp (Date received): [Blank]

Name of taxpayer or purchaser of stamps:

O. E. Powell.

Street address: 3603 N. E. Klickitat.

City, postal zone number, and State:

Portland, Oregon.

1. District in which return (if any) was filed:
Oregon.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1942, to Dec. 31, 1942.
3. Kind of tax: Income tax and penalties.
4. Amount of assessment, \$6,743.91; dates of payment, various (penalties only).

* * *

6. Amount to be refunded: \$2,890.25.*

* * *

The claimant believes that this claim should be allowed for the following reasons:

That the Commissioner of Internal Revenue assessed a deficiency in income taxes for the calendar year ended December 31, 1942, in the amount of \$3,853.66 and determined penalties pursuant to Section 293 (b), I.R.C., in the amount of \$1,926.83 and penalties pursuant to Section 291 (a), I.R.C., in the amount of \$963.42.

*Together with interest from date of payment as provided by law.

That no part of said deficiency was due to fraud with intent to evade the tax within the meaning of Section 293 (b), I.R.C.

That the taxpayer's failure to file a timely return (Form 1040) was due to reasonable cause and not due to wilful neglect.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ O. E. POWELL.

Dated May 27, 1954.

“EXHIBIT L”

(Copy)

U. S. Treasury Department
Office of the Director of Internal Revenue
830 N.E. Holladay
Portland 14, Ore.

Oct. 7, 1954.

In Replying Refer to:

C:A:CL

Mr. O. E. Powell,
4805 S.W. Sunset Rd.,
Portland, Ore.

Dear Mr. Powell:

In re: Claim for refund of Income Tax,
\$2,890.25 for the period year 1942.

In accordance with the provisions of Section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,

/s/ R. C. GRANQUIST,
District Director.

“EXHIBIT M”

(Copy)

Form 843

U. S. Treasury Department
Internal Revenue Service

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

District Director's Stamp (Date received): [Blank]

Name of taxpayer or purchaser of stamps: O. E. Powell.

Street address: 3603 N.E. Klickitat.

City, postal zone number, and States: Portland, Oregon.

1. District in which return (if any) was filed: Oregon.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1943, to Dec. 31, 1943.
3. Kind of tax: Income tax and penalties.
4. Amount of assessment, \$4,813.69; dates of payment, April, 1954 (penalties only).

* * *

6. Amount to be refunded: \$2,293.44.*

* * *

The claimant believes that this claim should be allowed for the following reasons:

That the Commissioner of Internal Revenue assessed a deficiency in income taxes for the calendar

*Together with interest from date of payment as provided by law.

year ended December 31, 1943, in the amount of \$2,520.25 and determined penalties pursuant to Section 293 (b), I.R.C., in the amount of \$1,260.13 and penalties pursuant to Section 291 (a), I.R.C., in the amount of \$630.06, and penalties pursuant to Section 294 (d)(1)(A) in the amount of \$252.03 and penalties pursuant to Section 294 (d)(1)(B) in the amount of \$151.22.

That no part of said deficiency was due to fraud with intent to evade the tax within the meaning of Section 293 (b), I.R.C.

That the taxpayer's failure to file a timely return (Form 1040) was due to reasonable cause and not due to wilful neglect.

That taxpayer's failure to file a timely declaration of estimated tax (Form 1040ES) and to make timely payments of the tax due thereon was due to reasonable cause and not due to wilful neglect.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ O. E. POWELL.

Dated May 27, 1954.

"EXHIBIT N"

(Copy)

U. S. Treasury Department
Office of the Director of Internal Revenue
830 N.E. Holladay
Portland 14, Ore.

Oct. 7, 1954.

In Replying Refer to: C:A:CL

Mr. O. E. Powell,
4805 S.W. Sunset Rd.,
Portland, Ore.

Dear Mr. Powell:

In re: Claim for refund of Income tax,
\$2,293.44 for the period year
1943.

In accordance with the provisions of Section 3772
(a)(2) of the Internal Revenue Code, this notice of
disallowance in full of your claim or claims is
hereby given by registered mail.

By direction of the Commissioner,

Very truly yours,

/s/ R. C. GRANQUIST,
District Director.

“EXHIBIT O”

(Copy)

Form 843

U. S. Treasury Department
Internal Revenue Service

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

District Director's Stamp (Date received): [Blank]

Name of taxpayer or purchaser of stamps: O. E. Powell.

Street address: 3603 N.E. Klickitat.

City, postal zone number, and State: Portland, Oregon.

1. District in which return (if any) was filed: Oregon.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1944, to Dec. 31, 1944.
3. Kind of tax: Income tax and penalties.
4. Amount of assessment, \$21,824.72; dates of payment, April, 1954 (penalties only).

* * *

6. Amount to be refunded: \$10,398.17.*

* * *

The claimant believes that this claim should be allowed for the following reasons:

That the Commissioner of Internal Revenue assessed a deficiency in income taxes for the calendar year ended December 31, 1944, in the amount of \$11,426.55 and determined penalties pursuant to Section 293 (b), I.R.C., in the amount of \$5,713.28 and penalties pursuant to Section 291 (a), I.R.C., in the amount of \$2,856.64, and penalties pursuant to Section 294 (d)(1)(A) in the amount of \$1,142.66 and penalties pursuant to Section 294 (d)(1)(B) in the amount of \$685.59.

That no part of said deficiency was due to fraud with intent to evade the tax within the meaning of Section 293 (b), I.R.C.

*Together with interest from date of payment as provided by law.

That the taxpayer's failure to file a timely return (Form 1040) was due to reasonable cause and not due to wilful neglect.

That taxpayer's failure to file a timely declaration of estimated tax (Form 1040ES) and to make timely payments of the tax due thereon was due to reasonable cause and not due to wilful neglect.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ O. E. POWELL.

Dated May 27, 1954.

“EXHIBIT P”

(Copy)

U. S. Treasury Department
Office of the Director of Internal Revenue
830 N.E. Holladay
Portland 14, Ore.

Oct. 7, 1954.

In Replying Refer to: C:A:CL

Mr. O. E. Powell,
4805 S.W. Sunset Rd.,
Portland, Ore.

Dear Mr. Powell:

In re: Claim for refund of Income Tax,
\$10,398.17 for the period year
1944.

In accordance with the provisions of Section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,

/s/ R. C. GRANQUIST,
District Director.

“EXHIBIT Q”

(Copy)

Form 843

U. S. Treasury Department
Internal Revenue Service

Claim

To Be Filed With the District Director Where
Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

District Director's Stamp (Date received): [Blank]

Name of taxpayer or purchaser of stamps: O. E. Powell.

Street address: 3603 N.E. Klickitat.

City, postal zone number, and State: Portland, Oregon.

1. District in which return (if any) was filed: Oregon.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1945, to Dec. 31, 1945.
3. Kind of tax: Income tax and penalties.
4. Amount of assessment, \$11,579.18; dates of payment, April, 1954 (penalties only).

* * *

6. Amount to be refunded: \$5,516.78.*

* * *

The claimant believes that this claim should be allowed for the following reasons:

That the Commissioner of Internal Revenue assessed a deficiency in income taxes for the calendar

*Together with interest from date of payment as provided by law.

year ended December 31, 1945, in the amount of \$6,062.40 and determined penalties pursuant to Section 293 (b), I.R.C., in the amount of \$3,031.20 and penalties pursuant to Section 291 (a), I.R.C., in the amount of \$1,515.60 and penalties pursuant to Section 294 (d)(1)(A) in the amount of \$606.24 and penalties pursuant to Section 294 (d)(1)(B) in the amount of \$363.74.

That no part of said deficiency was due to fraud with intent to evade the tax within the meaning of Section 293 (b), I.R.C.

That the taxpayer's failure to file a timely return (Form 1040) was due to reasonable cause and not due to wilful neglect.

That taxpayer's failure to file a timely declaration of estimated tax (Form 1040ES) and to make timely payments of the tax due thereon was due to reasonable cause and not due to wilful neglect.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ O. E. POWELL.

Dated May 27, 1954.

“EXHIBIT R”

(Copy)

U. S. Treasury Department
Office of the Director of Internal Revenue
830 N.E. Holladay
Portland 14, Ore.

Oct. 7, 1954.

In Replying Refer to: C:A:CL

Mr. O. E. Powell,
4805 S.W. Sunset Rd.,
Portland, Ore.

Dear Mr. Powell:

In re: Claim for refund of Income Tax,
\$5,516.78 for the period year 1945.

In accordance with the provisions of Section 3772
(a)(2) of the Internal Revenue Code, this notice of
disallowance in full of your claim or claims is
hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,

/s/ R. C. GRANQUIST,
District Director.

[Endorsed]: Filed December 15, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Ralph C. Granquist, District Director of Internal Revenue, by his attorney, Clarence Edwin Luckey, United States Attorney for the District of Oregon, in answer to the plaintiff's complaint herein:

I.

Denies the allegations contained in said complaint not admitted, qualified or specifically referred to below.

II.

Further answering plaintiff's complaint:

First Cause of Action

1. Admits the allegations contained in paragraph I.

2. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II.

3. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III.

4. Admits the allegations contained in paragraph IV.

5. Denies the allegations contained in paragraphs V, VI and VII but admits that the Commissioner mailed a letter dated September 25, 1950, to

the taxpayer and refers to that letter for a full, complete and accurate statement of the terms thereof.

6. Denies the allegations contained in paragraph VIII.

7. Denies the allegations contained in paragraphs IX and X.

8. Denies the allegations contained in paragraph XI but admits that on July 13, 1954, the taxpayer filed a claim for refund for the year 1937 and that a copy of said claim is attached to the complaint and marked Exhibit A but all statements in the claim are denied which are not otherwise admitted in this answer.

9. Admits the allegations contained in paragraph XII.

10. Denies the allegations contained in paragraph XIII.

Second Cause of Action

11. Repeats the answers to paragraphs I to IV, inclusive, of the First Cause of Action with the same force as fully set forth here.

12. Denies the allegations contained in paragraphs II, III and IV but admits that the Commissioner mailed a letter dated September 25, 1950, to the taxpayer and refers to that letter for a full, complete and accurate statement of the terms thereof.

13. Denies the allegations contained in paragraphs V, VI and VII.

14. Denies the allegations contained in paragraph VIII but admits that on July 13, 1954, taxpayer filed a claim for refund for the year 1938 and that a copy of said claim is attached to the complaint and marked Exhibit C but denies all statements in the claim that are not otherwise admitted in this answer.

15. Admits the allegations contained in paragraph IX.

16. Denies the allegations contained in paragraph X.

Third Cause of Action

17. Repeats the answers to paragraphs I to IV, inclusive, of the First Cause of Action with the same force as fully set forth here.

18. Denies the allegations contained in paragraphs II, III and IV but admits that the Commissioner mailed a letter dated September 25, 1950, to the taxpayer and refers to that letter for a full, complete and accurate statement of the terms thereof.

19. Denies the allegations contained in paragraphs V, VI and VII.

20. Denies the allegations contained in paragraph VIII but admits that on July 13, 1954, the plaintiff filed a claim for refund for the year 1939 and that a copy of said claim is attached to the

complaint and marked Exhibit E but denies all statements in the claim that are not otherwise admitted in this answer.

21. Admits the allegations contained in paragraph IX.

22. Denies the allegations contained in paragraph X.

Fourth Cause of Action

23. Repeats the answers to paragraphs I to IV, inclusive, of the First Cause of Action with the same force as fully set forth here.

24. Denies the allegations contained in paragraphs II, III and IV but admits that the Commissioner mailed a letter dated September 25, 1950, to the taxpayer and refers to that letter for a full, complete and accurate statement of the terms thereof.

25. Denies the allegations contained in paragraphs V, VI and VII.

26. Denies the allegations contained in paragraph VIII but admits that on July 13, 1954, the plaintiff filed a claim for refund for the year 1940 and a copy of said claim is attached to the complaint and marked Exhibit G but denies all statements in the claim that are not otherwise admitted in this answer.

27. Admits the allegations contained in paragraph IX.

28. Denies the allegations contained in paragraph X.

Fifth Cause of Action

29. Repeats the answers to paragraphs I to IV, inclusive, of the First Cause of Action with the same force as fully set forth here.

30. Denies the allegations contained in paragraphs II, III and IV but admits that the Commissioner mailed a letter dated September 25, 1950, to the taxpayer and refers to that letter for a full, complete and accurate statement of the terms thereof.

31. Denies the allegations contained in paragraphs V, VI and VII.

32. Denies the allegations contained in paragraph VIII but admits that on July 13, 1954, the plaintiff filed a claim for refund for the year 1941 and that a copy of said claim is attached to the complaint and marked Exhibit I but denies all statements in the claim that are not otherwise admitted in this answer.

33. Admits the allegations contained in paragraph IX.

34. Denies the allegations contained in paragraph X.

Sixth Cause of Action

35. Repeats the answers to paragraphs I to IV, inclusive, of the First Cause of Action with the same force as fully set forth here.

36. Denies the allegations contained in paragraphs II, III and IV but admits that the Commissioner mailed a letter dated September 25, 1950, to the taxpayer and refers to that letter for a full, complete and accurate statement of the terms thereof.

37. Denies the allegations contained in paragraphs V, VI and VII.

38. Denies the allegations contained in paragraph VIII but admits that on July 13, 1954, the plaintiff filed a claim for refund for the year 1942 and that a copy of said claim is attached to the complaint and marked Exhibit K but denies all statements in the claim that are not otherwise admitted in this answer.

39. Admits the allegations contained in paragraph IX.

40. Denies the allegations contained in paragraph X.

Seventh Cause of Action

41. Repeats the answers to paragraphs I to IV, inclusive, of the First Cause of Action with the same force as fully set forth here.

42. Denies the allegations contained in paragraphs II, III, IV and V but admits that the Commissioner mailed a letter dated September 25, 1950, to the taxpayer and refers to that letter for a full, complete and accurate statement of the terms thereof.

43. Denies the allegations contained in paragraphs VI, VII, VIII and IX.

44. Denies the allegations contained in paragraph X but admits that on July 13, 1954, the plaintiff filed a claim for refund for the year 1943 and that a copy of said claim is attached to the complaint and marked Exhibit M but denies all statements in the claim that are not otherwise admitted in this answer.

45. Admits the allegations contained in paragraph XI.

46. Denies the allegations contained in paragraph XII.

Eighth Cause of Action

47. Repeats the answers to paragraphs I to IV, inclusive, of the First Cause of Action with the same force as fully set forth here.

48. Denies the allegations contained in paragraphs II, III, IV and V but admits that the Commissioner mailed a letter dated September 25, 1950, to the taxpayer and refers to that letter for a full, complete and accurate statement of the terms thereof.

49. Denies the allegations contained in paragraphs VI, VII and VIII.

50. Denies the allegations contained in paragraph IX.

51. Denies the allegations contained in paragraph X but admits that on July 13, 1954, plaintiff

filed a claim for refund for the year 1944 and that a copy of said claim is attached to the complaint and marked Exhibit O but denies all statements in the claim that are not otherwise admitted in this answer.

52. Admits the allegations contained in paragraph XI.

53. Denies the allegations contained in paragraph XII.

Ninth Cause of Action

54. Repeats the answers to paragraphs I to IV, inclusive, of the First Cause of Action with the same force as fully set forth here.

55. Denies the allegations contained in paragraphs II, III, IV and V but admits that the Commissioner mailed a letter dated September 25, 1950, to the taxpayer and refers to that letter for a full, complete and accurate statement of the terms thereof.

56. Denies the allegations contained in paragraphs VI, VII, VIII and IX.

57. Denies the allegations contained in paragraph X but admits that on July 13, 1954, plaintiff filed a claim for refund for the year 1945 and that a copy of said claim is attached to the complaint and marked Exhibit Q but denies all statements in the claim that are not otherwise admitted in this answer.

58. Admits the allegations contained in paragraph XI.

59. Denies the allegations contained in paragraph XII.

Affirmative Defense

With respect to Paragraph VIII of the first cause of action, Paragraphs V in the second, third, fourth, fifth and sixth causes of action, and Paragraphs VI in the seventh, eighth and ninth causes of action set forth in plaintiff's complaint, this action will be defended on the basis that the taxpayer was guilty of fraud, with intent to evade tax within the meaning of Section 293(b) of the Internal Revenue Code.

Wherefore, the defendant prays that the complaint be dismissed and that defendant be allowed his costs and disbursements.

/s/ C. E. LUCKEY,
United States Attorney;

/s/ EDWARD J. GEORGEFF,
Assistant United States
Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above matter coming on regularly for pretrial conference before the undersigned Judge of the above-entitled Court on the day of June, 1955,

Plaintiff appeared by Arthur D. Jones of Attorneys for Plaintiff, and the defendant appeared by Richard Roberts of Attorneys for Defendant. The parties, with the approval of the Court, agreed upon the following:

Statement of Agreed Facts

I.

This is a civil action and arises under the laws of the United States of America providing for Internal Revenue, and jurisdiction rests upon Title 28, United States Code, Section 1340.

II.

O. E. Powell was, until his death on or about July 16, 1954, and at all times mentioned herein, a citizen and resident of Multnomah County, State of Oregon, and the United States.

III.

The plaintiff herein is the duly-appointed and qualified executrix of the estate of O. E. Powell, deceased, and was so appointed by the Circuit Court of the County of Multnomah, State of Oregon, Probate Department, on or about September 21, 1954.

IV.

The defendant is a duly-appointed and qualified District Director of Internal Revenue and was so appointed on or about October 31, 1951.

V.

On or about September 25, 1950, the Commissioner of Internal Revenue, over the signature of Geo. J. Schoeneman, mailed to the taxpayer, O. E. Powell, a letter asserting a deficiency in income taxes and penalties for each of the taxable years following and in the following amounts:

Year	Deficiency In Income Tax	50% Penalty	Sec. 291(a) Penalty	Sec. 294(d) Penalty
1937.....	\$ 100.99	\$ 50.50	\$ 25.25	\$
1938.....	102.10	51.05	25.23	
1939.....	76.82	38.41	19.21	
1940.....	590.16	295.08	147.54	
1941.....	1,027.81	513.91	256.95	
1942.....	3,853.66	1,926.83	963.42	
1943.....	2,520.25	1,260.13	630.06	403.25
1944.....	11,426.55	5,713.28	2,856.64	1,828.25
1945.....	6,062.40	3,031.20	1,515.60	969.98
	<hr/>	<hr/>	<hr/>	<hr/>
	\$25,760.74	\$12,880.39	\$6,439.90	\$3,201.48

VI.

On or about August 12, 1949, the Commissioner of Internal Revenue over the signature of L. E. Hallowell, Internal Revenue Agent, mailed to the taxpayer a letter asserting deficiencies for each of the years as set out in Paragraph V above; thereafter on July 20, 1950, the Commissioner of Internal Revenue, over the signature of L. E. Hallowell, Acting Internal Revenue Agent in Charge, mailed to

the taxpayer a letter dated July 20, 1950, informing the said taxpayer that pursuant to taxpayer's protest he had transferred the proposed assessment for each of the taxable years in question to the technical staff at Portland, Oregon. Thereafter, the Commissioner of Internal Revenue mailed his letter, mentioned in Paragraph V, to the taxpayer asserting the deficiencies in the amounts mentioned in said Paragraph V and for each of the said years mentioned therein and afforded the taxpayer the right to file a petition with the Tax Court of the United States. The said taxpayer failed to file a petition with the Tax Court and the Commissioner of Internal Revenue in due course, after the mailing of the aforementioned letter, assessed the tax in the amounts mentioned above.

VII.

The amount of taxes assessed against the taxpayer for each of the taxable years mentioned in Paragraph V above and in the amounts mentioned in said paragraph, exclusive of all of the penalties mentioned in said paragraph, are admitted by the plaintiff and defendant herein to be the correct amount of tax.

VIII.

On the 10th day of May, 1937, O. E. Powell filed with the Collector of Internal Revenue for the District of Oregon, delinquent income tax returns for the taxable years 1933 to 1936, inclusive.

IX.

That on or about the 9th day of March, 1948, the United States filed an Information against the taxpayer pursuant to Section 145(a) Internal Revenue Code, 26USC, 145(a), asserting that for the calendar years 1944 and 1945 taxpayer wilfully, knowingly and unlawfully failed to make income tax returns for the taxable years 1944 and 1945, and on May 24, 1949, O. E. Powell pleaded guilty to the above Information in the above-entitled Court.

X.

All of the amounts in dispute in this proceedings have been paid by the plaintiff herein and/or O. E. Powell, and were so paid prior to filing the claims for refund mentioned in Paragraph XI following.

XI.

On or about July 13, 1954, O. E. Powell filed timely claims for refund for each of the taxable years in controversy in the amounts as set out in Paragraph V, exclusive of the amounts set out in the column designating deficiency.

XII.

The District Director of Internal Revenue, defendant herein, mailed to the taxpayer on or about October 7, 1954, his Notice of Disallowance in Full of all of the above-mentioned claims for refund by registered mail, and thereafter this suit for the refund of said taxes was commenced.

Contentions of the Parties

Defendant's Contentions

1. The defendant herein contends that the 50% penalties, imposed pursuant to Section 293(b) of the Internal Revenue Code of 1939 for each of the taxable years 1937 through 1945, inclusive, and in the amounts as set forth in Paragraph V of the admitted facts set out above under the column marked "50% Penalty," were properly assessed by the Commissioner of Internal Revenue and collected by the defendant herein.

2. The defendant contends that the Commissioner of Internal Revenue correctly assessed and the defendant herein correctly collected from O. E. Powell and/or the plaintiff herein, penalties for failure to file income tax returns, pursuant to Section 291(a) Internal Revenue Code of 1939, for each of the taxable years 1937 through 1945, inclusive, and in the amounts as set forth in Paragraph V of the admitted facts set out above under the column marked "Sec. 291(a) Penalty," and that the failure of O. E. Powell to file income tax returns was not due to reasonable cause and due to wilful neglect and that said amounts are not now due and owing to the said plaintiff from the said defendant.

3. The defendant contends that the Commissioner of Internal Revenue correctly assessed and the defendant herein correctly collected from O. E. Powell and/or plaintiff herein, penalties for failure to file declarations of estimated tax, pur-

suant to Section 294(d) (1) (A), Internal Revenue Code of 1939, and to pay said tax, pursuant to Section 294(d)(1)(B), Internal Revenue Code of 1939, for each of the taxable years 1943 through 1945, inclusive, and in the amounts set forth in Paragraph V of the admitted facts set out above under the column marked "Sec. 294(d) Penalty" and that the failure of O. E. Powell to file said declarations and pay said taxes was not due to reasonable cause and was due to wilful neglect and that said amounts are not now due and owing to the said plaintiff from the said defendant.

Plaintiff's Contentions

1. The plaintiff contends that the Commissioner of Internal Revenue erroneously, arbitrarily and wrongfully assessed and the defendant herein erroneously, arbitrarily and wrongfully collected from O. E. Powell and/or the plaintiff herein, 50% fraud penalties, pursuant to Section 293(b), Internal Revenue Code of 1939, for each of the taxable years 1937 through 1945, inclusive, and in the amounts as set forth in Paragraph V of the admitted facts set out above under the column marked "50% Penalty," and that said amounts are now due and owing to the said plaintiff from the said defendant and no portion of said amounts has been repaid to the said plaintiff and/or O. E. Powell.

2. The plaintiff contends that the Commissioner of Internal Revenue erroneously, arbitrarily and wrongfully assessed and the defendant herein erroneously, arbitrarily and wrongfully collected from O. E. Powell and/or the plaintiff herein, penalties

for failure to file income tax returns, pursuant to Section 291(a), Internal Revenue Code of 1939, for each of the taxable years 1937 through 1945, inclusive, and in the amounts as set forth in Paragraph V of the admitted facts set out above under the column marked "Sec. 291(a) Penalty," and that the failure of O. E. Powell to file income tax returns was due to reasonable cause and not due to wilful neglect and that said amounts are now due and owing to the said plaintiff from the said defendant and no portion of said amounts has been repaid to the said plaintiff and/or O. E. Powell.

3. The plaintiff contends that the Commissioner of Internal Revenue erroneously, arbitrarily and wrongfully assessed and the defendant herein erroneously, arbitrarily and wrongfully collected from O. E. Powell and/or the plaintiff herein, penalties for failure to file declarations of estimated tax, pursuant to Section 294 (d) (1) (A), Internal Revenue Code of 1939, and to pay said tax, pursuant to Section 294 (d) (1) (B), Internal Revenue Code of 1939, for each of the taxable years 1943 through 1945, inclusive, and in the amounts set forth in Paragraph V of the admitted facts set out above under the column marked "Sec. 294(d) Penalty," and that the failure of O. E. Powell to file said declarations and pay said taxes was due to reasonable cause and not due to wilful neglect and that said amounts are now due and owing to the said plaintiff from the said defendant and no portion of said amounts has been repaid to the said plaintiff and/or O. E. Powell.

Exhibits

The following may be offered in evidence without further identification or authentication, but subject to any and all objections on other grounds.

1. Federal income tax returns, Form 1040, of O. E. Powell for each of the taxable years 1933 to 1936, inclusive.
2. Federal income tax returns Form 1040, of O. E. Powell for each of the taxable years 1937 to 1945, inclusive.
3. Claims for refund of Federal income taxes, Form 843, of O. E. Powell for each of the taxable years 1937 to 1945, inclusive.
4. Treasury Department letter disallowing claims for refund, dated October 7, 1954, over the signature of R. C. Granquist.
5. Letter informing O. E. Powell of a proposed **deficiency**, dated August 12, 1949, over the signature of L. E. Hallowell.
6. Treasury Department letter transferring the proposed deficiency to the technical staff of the Bureau of Internal Revenue, dated July 20, 1950.
7. Treasury Department letter of the determination of the tax deficiency and the opportunity of taxpayer to petition the Tax Court of the United States for a redetermination of the deficiency, dated September 25, 1950, over the signature of Geo. J. Schoeneman.

8. Information filed in the District Court of the United States charging O. E. Powell with the wilful failure to make tax returns for the taxable years 1944 and 1945.

9. O. E. Powell's plea entered to the Information mentioned in item 8 above.

10. Copy of Request for Transcript of Account or Certification, Form 899, showing the amounts and dates of payment of income taxes and penalties assessed against O. E. Powell for the taxable years 1933 through 1945, inclusive.

The following Exhibits are offered in evidence by the defendant and are not agreed to by the plaintiff on any grounds as to their authenticity, and plaintiff reserves the right to make objection to the introduction of said exhibits on any grounds whatsoever.

11. State of Oregon tax returns, Form 40, for the taxable years 1935 through 1939, inclusive.

12. State of Oregon tax returns, Form 40, for the taxable year 1948.

13. Copy of letter dated September 21, 1936, directed by the State of Oregon Tax Commission to O. E. Powell.

14. Copy of letter dated in 1941 directed by the State of Oregon Tax Commission to O. E. Powell.

15. Copy of letter dated February 6, 1941, directed by the State of Oregon Tax Commission to O. E. Powell.

16. Copy of letter dated February 1, 1945, directed by the State of Oregon Tax Commission to O. E. Powell.

17. Copy of letter dated September 24, 1948, directed by the state of Oregon Tax Commission to O. E. Powell.

Conclusion

The foregoing Pretrial Order is the result of a conference between the attorneys for the parties hereto and the Court. It is definite and comprehensive and isolates all of the issues of fact and law now existing between plaintiff and defendant. This Pretrial Order shall govern the course of the trial and shall not be changed or amended unless by consent of the parties and the Court or modified at the trial by the Court to prevent manifest injustice.

Dated this 7th day of February, 1956.

/s/ CHASE A. CLARK,
Judge.

Approved:

/s/ ARTHUR D. JONES,
Of Attorneys for Plaintiff.

/s/ RICHARD ROBERTS,
Of Attorneys for Defendant.

Lodged December 19, 1955.

[Endorsed]: Filed February 7, 1956.

[Title of District Court and Cause.]

OPINION

Clark, District Judge.

This is a civil action to recover certain sums assessed as penalties for failure to file tax returns and declarations of estimated tax, and for underestimate of estimated tax. The taxpayer, O. E. Powell, died shortly after this suit was instituted and the executrix of the estate was substituted as party plaintiff.

The taxpayer received taxable income for the years 1937 through 1945, but filed no federal income tax returns for those years and also failed to file declarations of estimated tax for 1943 through 1945. The failure of the taxpayer to so file came to the attention of the Internal Revenue Service in January, 1946; whereupon an investigation was begun to determine Powell's taxable income for the years involved. During the years 1937 to 1945, taxpayer owned and operated a number of gasoline service stations, later leasing them to the two sons, Lee G. Powell and Vincent O. Powell, receiving from them rental incomes. Also, taxpayer had, at various times during that period, 19 different properties that he rented, and also during that time he made in excess of 30 real estate sales, farms and residences, and also he had interest income on contracts and commissions from realty sales. In order to determine taxpayer's income it was necessary that the Internal Revenue agents search public records in four counties, determine from the sons how much they leased

the stations for, and contact real estate dealers and other parties to the various transactions. This was necessary because the taxpayer had indicated that he kept no records.

Deficiencies in income tax were ultimately determined and assessed for 1937 through 1945, together with fraud and negligence penalties and penalties for failure to file declaration of estimated tax and for a substantial underestimate of tax. The amounts assessed as tax and as penalties are not in controversy here, but only the correctness of the assessment of penalties. At the time of trial, counsel for taxpayer conceded the 25% penalty for wilful failure to file and also conceded the 10% penalty for failure to file declaration of estimated tax, leaving for this court's determination the correctness of the assessments of the 50% fraud penalty and the 6% penalty for substantial understatement of estimated tax.

Admitting the deficiencies in income tax assessed were the correct amount of taxes, taxpayer made payment of taxes and penalties, and this is a suit for refund of those penalties.

This Court has jurisdiction of the parties and the subject matter.

Internal Revenue Code of 1939, provides:

“Section 293. Additions to the tax in case of deficiency. * * * (b) Fraud. If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of

the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in Section 3612(d) (2).

(26 U. S. C. 1952 ed., Section 293.)

Was the taxpayer's failure to file income tax returns and pay income taxes for the years 1937 through 1945, due to fraud with intent to evade tax within the meaning of the statute?

It is elementary that fraud is never presumed and must be established by competent evidence. Fraud must generally be determined from surrounding inferences and circumstances fairly deduced from the conduct of the parties. "Badges of Fraud" as they are referred to in cases of this type, may include, but are not limited to, gross understatement of income, failure to keep proper books and records, failure to co-operate with investigating agents, and the giving of evasive answers. *Koscove vs. Commissioner*, 225 Fed. 2d 85 @ 87, citing other cases.

From the evidence presented and the record herein it is the opinion of this Court that all of these factors are present in some degree in this case.

As has been pointed out, this case does not involve income tax returns fraudulently filed, but rather is concerned with a situation where there were no tax returns filed at all.

It is the plaintiff's contention that the evidence fails to establish wilful commission on the part of

O. E. Powell, but merely shows passive conduct, which passive conduct does not disclose the fraud with intent to evade tax necessary for the assessment of the fraud penalty. Plaintiff relies on a case decided by the 8th Circuit, *First Trust and Savings Bank vs. U. S.*, 206 Fed. 2d 97, as being in support of that position.

The case cited and the present case differ in that the taxpayer in the *First Trust and Savings Bank* case, Mr. Kraftmeyer, although he wilfully failed to make returns required, had never been informed that he was required to file a return, and apparently was under the impression that he had no taxable income, and did not know that he owed any tax. There is further evidence that he co-operated fully with the Internal Revenue Agents.

In the instant case the evidence discloses that Mr. Powell, during this period of his failure to file, made it known that he was not in sympathy with the administration and did not like the way the Government was run and did not believe in paying taxes. He had further indicated that he was thinking of getting his things gathered together and moving out of the country—going to South America where he wouldn't have to pay taxes.

Powell's son testified that he told his father he should be paying income tax, that it was the thing for him to do, and he, the father, said he knew it, but that he didn't pay because he didn't believe in the way the Government was wasting the money; he

said he believed in taxation but he didn't believe that the Government should waste the money. His failure to file returns was based primarily upon political convictions.

There is no evidence in the record of alteration or concealment of bank statements, cancelled checks or real estate contracts by the taxpayer. Mr. Powell said he did not have records, and there is no evidence of these having been destroyed or falsely made. However, there was no need for him to make false records or destroy records in contemplation of an investigation by the Internal Revenue Service, when at that time the taxpayer wasn't making or filing any income tax returns. The same thing is true of concealment of assets and the other "badges of fraud" to which reference has been made. The mere fact that these acts were not apparent at the time he was failing to make returns does not mean that they didn't exist.

The records which Powell kept were adequate for him to carry on his business profitably, yet Powell never volunteered any records, information or contracts. It was only as various transactions were discovered by the Internal Revenue Agents and specific requests made for all records and documents pertinent thereto, that they were made available by the taxpayer.

Fraud implies bad faith, intentional wrongdoing and sinister motive. It is never implied or presumed. It may comprise conduct, whether of omission or

commission, involving a breach of legal duty and resulting in damage to that one to whom the duty is owed.

Negligence, whether slight or great, is not equivalent to the fraud with intent to evade tax named in the statute. The fraud meant is actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing. Mere negligence does not establish either. *Griffiths vs. Comm.*, 50 Fed. 2d 782.

Here Mr. Powell's omission was not accidental. It was purposeful, wilful and deliberate omission to file and pay income taxes. Should this Court hold that there was no fraud with intent to evade taxes in this case, it would open the door to all who desire to evade taxes to escape the fraud penalty merely by wilfully and deliberately failing to file. It is the opinion of the Court that this plaintiff's action in so doing, coupled with his failure to keep records and his lack of co-operation in making full disclosure of all real estate transactions to the investigating agents, constitute fraud with intent to evade payment of tax, and the fraud penalty provided by Sec. 293 (b), Internal Revenue Code, was properly assessed.

The second question for this Court to determine is the correctness of the penalty assessed for substantial understatement of estimated tax or whether such a penalty is excluded by the penalty for failure to file any declaration of estimated tax whatsoever?

Sec. 294 (d) (1) (A), Internal Revenue Code, provides a 10% penalty for failure to file declaration of estimated tax and Sec. 294 (d) (2) provides for a 6% penalty for substantial underestimate of estimated tax. The Government has assessed both penalties against this taxpayer.

The Government relies on cases decided by the Tax Court to the effect that no declaration of estimated tax is in effect a zero declaration and therefore, in cases such as this, would be a substantial underestimate of estimated tax.

This Court is not inclined to that view, but agrees with the District Court of Georgia in the case of *United States vs. Ridley*, 120 F. Supp. 530, in which the Court said, at page 538,

“ * * * However, the addition of 6% for substantial underestimate of estimated tax is improper for the very obvious reason that the tax was not underestimated, indeed, the taxpayer filed no declaration of estimated tax at all and suffers the greater sanction of 10% addition to the tax for the failure, and the failure to pay the tax.”

In the opinion of this court this is correct because everyone failing to file a declaration would be guilty of an underestimate, and thus the greater penalty applies to take care of both failures on the part of the taxpayer.

In accordance with this view also is *Owen v. United States*, 134 Fed. Supp. 31, decided by the District Court of Nebraska.

For these reasons the plaintiff is entitled to recover the amount assessed as 6% penalty under Sec. 294(d)(2).

Counsel for the defendant Government may prepare Findings of Fact, Conclusions of Law and Judgment in accordance with the views expressed herein, submitting the original to the Court and serving a copy on opposing counsel.

[Endorsed]: Filed November 13, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. This is a civil action brought to recover a total of \$22,521.09 in penalties assessed by the Commissioner of Internal Revenue against Ora E. Powell, deceased, for the years 1937 through 1945 and collected by Ralph C. Granquist, District Director of Internal Revenue.

2. Plaintiff is the duly qualified and appointed executrix of the Estate of Ora E. Powell.

3. Plaintiff conceded at the trial that the 25% penalties for willful failure to file income tax returns under Section 291 of the Internal Revenue Code and the 10% penalties assessed for failure to

file declarations of estimated tax under Section 294 (d)(1)(A) of the Internal Revenue Code were properly assessed. Plaintiff did not concede, however, that the 50% penalties for fraud with intent to evade tax under Section 293(b) and the 6% penalties for substantial underestimate of estimated tax under Section 294(d)(2) of the Internal Revenue Code were properly assessed.

4. Ora E. Powell received taxable income in each year for the years 1937 through 1945. He did not file federal income tax returns for those years, however, nor did he file any declaration of estimated tax for the years 1943 through 1945. The deficiencies in income tax subsequently assessed against him by the Commissioner of Internal Revenue, which plaintiff admits to be correct, together with the Section 293(b) and Section 294(d) penalties assessed, are as follows:

Year	Deficiency In Income Tax	Sec. 293(b) Penalty	Sec. 294(d) Penalty
1937.....	\$ 100.99	\$ 50.50	\$
1938.....	102.10	51.05	
1939.....	76.82	38.41	
1940.....	590.16	295.08	
1941.....	1,027.81	513.91	
1942.....	3,853.66	1,926.83	
1943.....	2,520.25	1,260.13	430.25
1944.....	11,426.55	5,713.28	1,828.25
1945.....	6,062.40	3,031.20	969.98
	<hr/>	<hr/>	<hr/>
	\$25,760.74	\$12,880.39	\$3,201.48

5. The taxable income received by Ora E. Powell during the years 1937 through 1945 consisted of profits from the operation of gasoline filling sta-

tions, rental of gasoline filling stations and profits on the sale of real estate.

6. Ora E. Powell was aware of his obligation to file federal income tax returns, having filed such returns for years prior to 1937. He was advised by an employee of the Oregon State Tax Commission and by one of his sons to file federal income tax returns.

7. Ora E. Powell made statements to internal revenue agents in 1946 and 1947 to the effect that his failure to file income tax returns was based upon his disagreement with the way in which the country was being run and that he did not believe in paying taxes. Ora E. Powell made statements to one of his sons that the reason he did not pay taxes was that he believed the Government was wasting money.

8. Ora E. Powell did not keep books and records adequate to show his income during the years 1937 through 1945. The deficiency assessments made by the Commissioner of Internal Revenue were based, in part, upon information obtained from public records and the records of other persons, including the lessees of his gasoline filling stations, real estate dealers, and the company from which he purchased gasoline.

9. On May 24, 1949, Ora E. Powell entered a plea of guilty to the charge of willfully, knowingly and unlawfully failing to file federal income tax returns for the years 1944 and 1945 in violation of Section 145(a) of the Internal Revenue Code.

10. Ora E. Powell gave evasive answers to the internal revenue agents attempting to ascertain his taxable income for the years 1937 through 1945 and did not co-operate with the agents in their investigation.

11. The failure of Ora E. Powell to file any federal income tax returns for the years 1937 through 1947 was knowing, willful and intentional, and was due to fraud with intent to evade tax.

12. Ora E. Powell did not file any declaration of estimated tax for the years 1943 through 1945. His failure to file such declaration was not due to reasonable cause.

Conclusions of Law

1. This Court has jurisdiction over the subject matter and the parties.

2. With respect to the 50% fraud penalties assessed by the Commissioner of Internal Revenue against Ora E. Powell for the years 1937 through 1945, defendant has the burden of proving fraud with intent to evade tax by clear and convincing evidence.

3. With respect to the 6% penalties assessed by the Commissioner of Internal Revenue against Ora E. Powell for substantial underestimation of estimated tax declared, plaintiff bears the burden of proof.

4. The deficiencies in income tax assessed by the Commissioner of Internal Revenue against Ora E.

Powell for the years 1937 through 1945 were due to fraud with intent to evade tax within the meaning of Section 293(b) of the Internal Revenue Code, and the 50% fraud penalties assessed against Ora E. Powell by the Commissioner of Internal Revenue for the years 1937 through 1945 were proper.

5. The 6% penalties assessed by the Commissioner of Internal Revenue for the years 1943 through 1945 against Ora E. Powell for substantial underestimation of estimated tax under Section 294(d)(2) of the Internal Revenue Code were not proper for the reason that Ora E. Powell, who had not filed any declaration for those years, paid the 10% penalties prescribed by Section 294(d)(1)(A) of the Internal Revenue Code, and was not required to pay, in addition, for an underestimate he never made.

6. Plaintiff is entitled to judgment in the amount of \$1,200.55, representing the 6% penalties improperly assessed by the Commissioner of Internal Revenue against Ora E. Powell under Section 294(d)(2) of the Internal Revenue Code, together with interest thereon as provided by law.

/s/ CHASE A. CLARK,

United States District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed December 26, 1956.

In the United States District Court
for the District of Oregon

Civil No. 7837

GRACE M. POWELL, Executrix of the Estate of
O. E. Powell, Deceased,

Plaintiff,

vs.

RALPH C. GRANQUIST, District Director of
Internal Revenue,

Defendant.

JUDGMENT

This cause was tried by the Court, sitting without a jury, on February 7, 1956. Appearances having been made by counsel for the parties, and the Court having considered the evidence and the arguments of counsel, now, therefore, it is

Ordered, Adjudged and Decreed that plaintiff recover of defendant \$1,200.55, together with statutory interest thereon.

The Court hereby certifies that there was probable and reasonable cause for the acts of defendant in demanding and collecting from plaintiff's decedent the penalties for the refund of which this judgment is entered.

So ordered this 21st day of December, 1956.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed December 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice of Appeal Is Hereby Given that Grace M. Powell, Executrix of the Estate of O. E. Powell, Deceased, the plaintiff herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from so much of the final judgment, as was entered in favor of defendant and against plaintiff, entered in this action on December 21, 1956.

/s/ ARTHUR D. JONES,

/s/ FREDERICK A. JAHNKE,
Attorneys for Plaintiff.

[Endorsed]: Filed January 9, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

I, Grace M. Powell, Executrix of the Estate of O. E. Powell, Deceased, as principal, and National Surety Corporation, incorporated under the laws of the State of New York, and duly authorized and qualified to write and execute bonds and undertakings within the district of Oregon, as surety, and our personal representatives, successors and assigns, are bound to pay to Ralph C. Granquist, District Director of Internal Revenue, the sum of Two Hundred and Fifty Dollars (\$250.00).

The condition of this bond is that, whereas the plaintiffs have appealed to the United States Court

of Appeals for the Ninth Circuit by notice of appeal filed on January 9, 1957, from the judgment of the court entered on December 21, 1956, if the plaintiff will pay all costs adjudged against her if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void; otherwise payment of this bond will be due forthwith.

/s/ GRACE M. POWELL,

Executrix of the Estate of O. E. Powell, Deceased.
Plaintiff and Principal;

[Seal]

NATIONAL SURETY
CORPORATION,

By /s/ ALICE T. BERKEMEIER,
Attorney-in-Fact, Surety.

Countersigned:

PHIL GROSSMAYER CO.,
Gen'l Agents;

By /s/ ALICE T. BERKEMEIER,
Resident Agent.

Service of copy acknowledged.

[Endorsed]: Filed January 10, 1957.

In the United States District Court
for the District of Oregon

No. 7837

GRACE M. POWELL, Executrix of the Estate of
O. E. POWELL, Deceased,
Plaintiff,

vs.

RALPH C. GRANQUIST, District Director of
Internal Revenue,
Defendant.

TRANSCRIPT

This matter was tried before the Honorable Chase
A. Clark, sitting without a jury, at Portland, Ore-
gon, on February 7, 1956.

Appearances:

ARTHUR D. JONES, ESQ.,
FREDERICK A. JAHNKE, ESQ.,
Attorneys for the Plaintiff.

C.E. LUCKEY, ESQ.,
United States District Attorney;
EDWARD J. GEORGEFF, ESQ.,
Assistant United States District Attorney;
ALLEN A. BOWDEN, ESQ.,
Special Assistant to the Attorney General;
GILBERT E. ANDREWS, ESQ.,
Special Assistant to the Attorney General,
Washington, D. C.,
Attorneys for the Defendant.

February 7, 1956—10 o'Clock A.M.

(Admission of certain counsel by the Court.)

The Court: If you Gentlemen are ready, you may proceed.

Mr. Jones: Your Honor, this is a case for the refund of Federal Tax penalties for the years 1937 to 1945, inclusive. There is no question as to the amount of tax due and owing that has been agreed upon by the parties to the case. Claim was filed for the fifty per cent fraud penalty—the twenty-five per cent penalty for failure to file a return and for the penalty for failure to file a declaration of estimated tax and pay the estimated tax. We are going to concede the twenty-five per cent penalty because we do not feel that we can sustain the burden of proving that this failure to file return was due to reasonable cause, we are also going to concede the ten per cent penalty for failure to file the declaration of estimated tax. The six per cent penalty for failure to pay the tax we are contesting. This is a pure question of law and I think it can be argued on briefs. Now, as to the fraud penalties, the burden of proof rests with the Government, so I think they should open their case at this time.

Mr. Andrews: If the Court please I would like to move to dismiss the Plaintiff's case under 41B with respect to the penalties involved. [3*]

I understand that the Ohlinger case——

The Court: That happens to be my case.

Mr. Andrews: I know it is, Your Honor. I understand that in this circuit that the burden of proof is

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

held to be on the Government as to the fraud issues. We are ready to proceed with our burden of proving that Ora E. Powell's failure to pay income tax through the years 1937 to 1945 was due to fraud with intent to evade tax.

Our first witness will be Mr. Cecil Tucker.

CECIL TUCKER

called as a witness by the Defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Andrews:

Q. What is your occupation, Mr. Tucker?

A. I work for the District Director of Internal Revenue.

Q. What is your title, if any?

A. Chief of Claims section.

Q. What are the duties of the Chief of Claims section?

A. I supervise the processing and scheduling of over-assessments and the initial reviewing of claims for refunds and abatements, the preparing of certificates of assessments and payments made on account and testifying on those assessments and payments in Court cases.

Q. Then your testimony is that you are the authorized representative of the District Director of Internal Revenue to testify in this case? [4]

A. Yes, sir.

Q. I hand you document dated July 5, 1955, pur-

(Testimony of Cecil Tucker.)

porting to be signed by R. C. Granquist and headed "certificate of assessments and payments"; will you identify that document, please?

A. This is form 899 certificate of assessments and payments covering the years 1937 through 1945 for O. E. Powell.

Q. Can you tell from an examination of that form the dates on which tax returns were first filed by Ora E. Powell?

A. I can tell the year in which they were filed, yes.

Q. In what year was the return for 1937 filed?

A. That was in the year 1951.

Q. And for the year 1938?

A. During 1951.

Q. For the year 1939? A. During 1951.

Q. And for the year 1940?

A. During 1951.

Q. And for the year 1941?

A. During 1951.

Q. For the year 1942? A. During 1951.

Q. For the year 1943? A. During 1951.

Q. For the year 1944?

A. The first return there was filed September, 1948. [5]

Q. And for the year 1945?

A. September, 1948.

Q. Can you tell from looking at that form the date on which Mr. Powell filed a declaration of estimated tax for the year 1943?

(Testimony of Cecil Tucker.)

A. There is no record of an estimated tax filed for 1943.

Q. And for the year 1944 with respect to estimated tax?

A. There is no record of an estimate filed for 1944.

Q. And for the year 1945?

A. There is no record of an estimate filed for the year 1945

Mr. Andrews: No further questions.

Mr. Jones: No questions.

Mr. Andrews: At this time I would like to offer in evidence as Defendant's exhibit 1, the Certificate of Assessments and Payments form 899.

Mr. Jones: I have no objection although I haven't had an opportunity to examine it.

The Court: It may be admitted.

CARL P. ARMSTRONG

called as a witness by the Defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Andrews:

Q. By whom are you employed, Mr. Armstrong?

A. I am employed by the United States National Bank of Portland.

Q. What is your position with the Bank? [6]

A. Assistant Manager of the Ladd and Bush Salem Branch of the United States National.

(Testimony of Carl P. Armstrong.)

Q. For how long have you been with the Bank?

A. You mean with the Banking fraternity?

Q. No, sir—how long have you held your present position?

A. The present position, I have held that since 1949.

Q. What was your position prior to that time?

A. I was office manager of the State Tax Commission from the period of September, 1937, to September, 1949.

Q. What was your title with the Commission?

A. In the final analysis I was the office manager of the Portland Office of the State Tax Commission.

Q. The Oregon State Tax Commission?

A. That's right.

Q. Did there come a time in the Court of your official duties when you contacted Mr. Ora E. Powell?

A. Yes, sir.

Mr. Jones: I object to this; I don't see how it has a relevancy to the case. They are talking about State Income Tax now.

The Court: I will let him answer—it is a Court matter. I don't know just where it would be material and I will not consider it if I don't find later that it is material.

Q. What was the date of that initial contact, Mr. Armstrong?

A. The initial contact was sometime prior to September, 1938. [7]

Q. What were the circumstances under which the contact was made?

(Testimony of Carl P. Armstrong.)

A. The State of Oregon, during that period, were making a complete investigation of all County records regarding taxpayers that had not filed income tax returns. I was assigned to the Clackamas County area and made the investigation of the County records during the Fall of '38.

Q. What was the nature of your contact with Mr. Powell?

A. The nature—the County records, upon our investigation of the assessment of personal property, the information secured was checked with the State Tax Commission in a determination of getting to the taxpayers that had not filed income tax returns.

Q. Is it your testimony that Mr. Powell had not at that time filed state income tax returns?

A. That is true.

Q. What events led up to your contact with Mr. Powell?

A. The information secured from the Clackamas County records, as I indicated, was checked with the records of the State at Salem and we found that it was necessary to write him a letter requesting his presence in the temporary office established at Oregon City, affiliated with the Sheriff's office.

Q. What took place at your conference with Mr. Powell?

A. A letter was sent to Mr. Powell for him to appear regarding his tax liability. [8]

Q. Did he appear?

A. Yes, he appeared and indicated that he had records, and we explained to him his responsibility in filing his income tax returns.

(Testimony of Carl P. Armstrong.)

Q. Is that State Income tax returns or Federal?

A. State Income tax returns.

Q. Did you say anything to him about Federal Income tax returns?

A. Yes; upon completion of our investigation of the records that he had for the years 1935 and '36 and also '37, we indicated to him at that time that he also had a tax liability to the Federal Government. This procedure was followed in all cases of our investigation because of the method used by the State Tax Commission, which was to familiarize the taxpayer with their responsibility and also to indicate to them the responsibility they might have to the Federal Government in that respect.

Q. Mr. Armstrong, I hand you document marked "defendant's exhibit 2" for identification, under the seal of the Oregon State Tax Commission, purporting to be the income tax return filed with the State of Oregon by Mr. Powell for the years beginning with 1935; do you recognize those returns?

A. Yes, I do.

Q. Did you have anything to do with the preparation of those returns? [9]

A. Yes; my associate and I called upon Mr. Powell and looked over his records.

Q. Did you have anything to do with the preparation of those returns? A. Yes.

Q. What did you have to do with the preparation of the returns?

A. The preparation of the returns—I discussed with him his responsibility and also went into his

(Testimony of Carl P. Armstrong.)

records and even though the writing here was made by my associate at that time, my name appearing, however, as responsible for the submission of the return and that the records were investigated by me as well as my associate.

Q. Did Mr. Powell then have records available for the years 1935 and 1936?

A. Yes, as they were. They were records that we were able to determine his tax liability.

Q. And were there records available for the year 1937?

A. No, they were not.

Q. Did Mr. Powell make any explanation for his failure to have records available for 1937?

A. His records—he didn't have any records available for 1937 upon the preparation of this return so as to bring it into a correct condition. We arbitrarily increased his net income for 1937 based upon an increase of ten per cent over that of 1936, so as to clear our [10] records for the liability for the years 1935, '36 and '37.

Q. Did you ever have any contact with Mr. Powell or anyone acting for him after that contact in 1938?

A. Other than the gentleman—one of the accountants that appeared with some of the delinquent returns and presented them to me in the Portland office.

Q. What was the name of the accountant?

A. Willoughby.

Q. Was he the accountant for Mr. Powell?

A. He represented himself to be.

Q. That was in 1942?

A. Yes, that was in 1942, June of '42.

(Testimony of Carl P. Armstrong.)

Q. Do you know who made out those returns for the years 1938 and '39?

A. Mr. Willoughby filed those returns, I am positive.

Q. At any time in any conversations with Mr. Powell did he ever indicate that he was unaware of the requirement for filing either Federal or State income tax returns?

Mr. Jones: I object to that—will you please restate the question?

(Question read by reporter.)

Mr. Jones: I beg your pardon; I withdraw the objection.

Q. With the information we had it was very evident that he didn't realize his responsibility and for that reason he was enlightened on the law—

Mr. Jones: I object to that as not being responsive to the question.

The Court: Yes, that's right; it is not responsive.

Q. Did you understand the question, Mr. Armstrong?

A. Perhaps not; will you repeat that again.

Q. My question was: Did Mr. Powell at any time ever say anything to you which indicated that he was ignorant of the legal requirements for filing either State or Federal income tax returns?

Mr. Jones: I object to that, your Honor, as a leading question.

The Court: It is leading but he may answer it and he may answer it yes or no.

(Testimony of Carl P. Armstrong.)

A. I would say no, he wasn't familiar.

Q. Was there an answer to that question?

A. Well, I didn't quite get that—may I make a statement?

The Court: Well, I think your counsel—

Mr. Andrews: I will withdraw the question. You may cross-examine.

Mr. Jones: At this time I would like to make a motion that his testimony be stricken as it is immaterial. We are not delving into the State tax liability here and his testimony is immaterial and irrelevant. [12]

The Court: I will not rule on your motion at this time but will take it under advisement.

Cross-Examination

By Mr. Jones:

Q. Mr. Tucker, were you aware or did you ask Mr. Powell directly about his responsibility for filing a State income tax return for the years in question? A. Yes, he was asked that.

Q. And what was his answer?

A. Well, he evaded the filing of state income tax returns and it was very evident from the information that I had that it justified the investigation and his appearance when requested.

Q. What character was this evasion, Mr. Tucker—you speak of evasion; what do you mean by evasion?

A. Well, the fact that he didn't prepare income tax returns that justified the filing of returns.

(Testimony of Carl P. Armstrong.)

Q. That was your own conclusion, that is not any statement that he made to you?

A. I think that every taxpayer should file an income tax return if the information we had justified the filing of a tax return.

Q. The question was: Were you aware or did Mr. Powell make any statement to you as to his knowledge of his obligation to file a tax return?

A. Well—— [13]

Q. Could you answer that yes or no?

A. Certainly with the information we had, it justified the filing of a return.

Q. (By Mr. Jones): Your Honor, will you direct the witness to answer the question?

The Court: Yes; I think, Mr. Witness, that you better try to answer the question a little more directly.

A. Will you restate your question?

Q. Were you at any time, let me state that again. During the course of your investigation, did Mr. Powell make any statement to you that would indicate to you that he had knowledge of his responsibility of filing a return for the period under question? A. Well, he didn't file any returns.

The Court: It might be helpful, Mr. Witness, if you would just tell what the conversation was and what he said and what you said to him.

Q. He responded to the request to appear at the office there and the information that I had I went over with him in detail and indicated to him that he should file income tax returns, that the information justified the filing of income tax returns.

(Testimony of Carl P. Armstrong.)

The Court: What did he say to you?

A. He indicated to me that his attitude at that time was that of no responsibility to file any income tax returns. When I explained to him, after the investigation, I went [14] further to inform him that he should file his Federal return as well as the State return. I explained the situation to him.

Q. During your investigation for the State Tax Commission in this regard, what was the form of your investigation?

A. Well, in the investigation of the County records we had the assessments of personal properties and the data that we ran against the Federal records as well as a report of our "99" which was rental income received from the Union Oil Company of California, indicating an amount—is it necessary to state the amount?

Q. If you have it.

A. Indicating \$1125.00 rental income, as well as the information that I secured from the County records that justified him being called in and asking why he hadn't filed State income tax returns.

Q. He made no direct statement to you or admit to you that he had a duty to file those returns?

A. I cannot recall what was said other than the fact that he hadn't filed.

Q. As a matter of fact, you don't recall what he said about those returns then?

A. Other than his attitude toward the filing of the income tax returns.

Mr. Jones: That's all.

(Testimony of Carl P. Armstrong.)

Redirect Examination

By Mr. Andrews:

Q. Mr. Armstrong, we have talked about the receipt of interest payments from the Union Oil Company of California—

A. Rental payments.

Q. We have talked about the receipt of rental payments from the Union Oil Company of California, is that what is indicated by the first slip on Defendant's Exhibit 2 marked for identification?

A. That is the exhibit on the year '35.

Q. Your answer is yes? A. Yes.

Q. Is it your testimony then that Mr. Powell filed his income tax return with the State of Oregon after the investigation made by the Oregon State Tax Commission? A. Yes, sir.

Q. And for what years?

A. The returns I prepared were for the years 1935, '36 and '37.

Q. What about the years 1938 and '39, was the filing made on time? A. No, they were not.

Q. What led up to the filing of returns for the years 1938 and 1939 by Mr. Powell?

A. A letter from the Chief Auditor in the Salem Office informing him of not filing what we call a master file checking—informing him that he had not filed his 1938 return. [16]

Q. And in what year was that letter sent?

A. That letter was sent in '42.

Mr. Andrews: No further questions.

(Testimony of Carl P. Armstrong.)

Recross-Examination

By Mr. Jones:

Q. You didn't talk to him directly about his return for 1938 and '39, is that correct?

A. I did not talk to him personally about the 1938 and '39, other than his accountant brought it to my attention at the time I was in charge of the Portland Office.

Q. You have——

A. I did assess the penalties.

Q. You have no knowledge, no personal knowledge of his 1938 and '39 tax returns, the preparation of them? A. No, I do not.

Mr. Jones: That's all.

Mr. Andrews: At this time I would like to offer in evidence Defendant's Exhibit 2 for identification as Defendant's Exhibit 2.

Mr. Jones: Your Honor, I object to the introduction of this exhibit in evidence because I don't think they are properly attested to as required by Section 1739 of the Judicial Code.

(Remarks of counsel on the objection reported and not transcribed.) [17]

The Court: It may be admitted.

HAROLD PARSONS

called as a witness by the Defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Andrews:

Q. What is your occupation, Mr. Parsons?

A. Special agent, Internal Revenue service.

Q. For how long have you been a special agent?

A. Since July 1, 1945.

Q. For how long have you been employed by the Internal Revenue service?

A. Since November, 1942.

Q. What are your duties as a special agent?

A. Among other things we gather evidence for criminal prosecutions in tax evasion cases.

Q. Did there come a time when you were called upon in the course of your official duties to contact Mr. Ora E. Powell?

A. Yes, sir.

Q. What was the date of that contact?

A. Well, I was assigned to the investigation of the case of Ora E. Powell in June, 1946, and the investigation was extended until October 31, 1947.

Q. What was the nature of that investigation?

A. Charge of failure to file income tax [18] returns.

Q. What was the nature of your investigation?

A. Gathering evidence to determine the tax liability of Ora E. Powell.

Q. How did you go about determining that tax liability?

(Testimony of Harold Parsons.)

A. Among other things examined the county records of Multnomah County, Washington County, Marion County and Clackamas County, the deed and mortgage records to determine the purchase and sale of real estate by Ora E. Powell.

Q. Why didn't you go to Mr. Powell's records and find that information?

A. We requested records from Mr. Powell and he stated that he had not kept records of his real estate transactions.

Q. Did he state whether or not he had kept records during the period in issue, 1937 to 1945?

A. That was the only period for which we requested records, the period under investigation.

Q. Did he state that he did or did not keep records during that period?

A. That he did not keep records during the period we were investigating.

Q. Was your investigation confined solely to the ultimate computation of the gain or loss of the real estate transactions of Mr. Powell's?

A. No, we had investigated as to the reason why he had not filed returns. [19]

Q. How long did your investigation take?

A. From June of '46 to October of '47, probably during that time we would spend between thirty and forty working days.

Q. Did Mr. Powell ever make any documents or information available to you?

A. There were some real estate sales on contract, and when we would discover such sales we would

(Testimony of Harold Parsons.)

request that he bring in the contracts so that we could determine the amount of payments on the contract and the interest. When he was specifically asked for a certain contract he would bring it in.

Q. Aside from the contracts specifically requested one at a time, was there any documents or information made available to you by Mr. Powell?

A. No, not to me.

Q. Did Mr. Powell ever state to you at any time his reason for failure to file income tax returns for the years 1937 to 1945?

A. Yes.

Q. What reasons did he state?

A. On at least two occasions he made the statement that he was not in sympathy with the administration and did not like the way the Government was run and did not believe in paying income taxes.

Q. Do you know the dates of those statements?

A. I know the date of one statement. It was—I believe [20] I can remember—no, I wouldn't without referring to my notes. We are required to keep a diary and I have those dates available if we have occasion to look them up.

Q. Do you have the diary here?

A. I haven't it here with me, however, I have excerpts from it and I could obtain the date.

Q. Do you have that with you?

A. I have it in my brief case.

The Court: You may get it.

A. That was on June 10, 1947.

Q. Was that the first or the second time?

(Testimony of Harold Parsons.)

A. That was the second time.

Q. When was the first statement made?

A. Some time prior to that, I don't know just the date.

Q. Do you know the year?

A. I think it was earlier in 1947.

Q. Did Mr. Powell ever state any other reason for his failure to file income tax returns?

A. Yes, he said it was because of ill health and inability to obtain the services of a competent book-keeper and that he hadn't kept records.

Q. Did Mr. Powell ever indicate to you at any time that he was unaware of the legal requirement to file income tax returns? A. No.

Mr. Andrews: You may cross-examine. [21]

Cross-Examination

By Mr. Jones:

Q. Did Mr. Powell state to you the nature of his ill health, Mr. Parsons?

A. Yes; he said he was suffering from diabetes.

Q. Did you ever make a direct request of Mr. Powell to bring all his books and records into the Internal Revenue Service? A. Yes.

Q. Did he bring those available records in?

A. He said he didn't have records. At no time did he bring in any records aside from the few contracts that were specifically requested.

Q. Did he say that he didn't have any books and records—you were referring to formal books and records, were you? A. That's right.

(Testimony of Harold Parsons.)

Q. You didn't request him to bring in his cancelled check and bank statements and records of that nature, invoices and such?

A. My work was not audit work. A revenue agent attended to the audit work, so I would not and did not request cancelled checks or bank statements.

Q. Then, in other words, you made no request for him to bring in what we might term subsidiary records to a formal set of books?

A. At more than one time we requested him to bring in any records that he had, any records whatsoever that would assist in determining the amount of his income. [22]

Q. Did you make a specific designation to him of what these records should consist of, or make a specific request of him of the nature of the records you wanted?

A. I don't know that I at any time listed all the possible records that he might have, it was specifically requested that he bring in any records pertaining to his income.

Q. Isn't it quite possible that he thought you were referring to a formal set of books and records?

Mr. Andrews: I object to that, obviously——

Mr. Jones: I will withdraw it.

Q. Then, for all you know, these records might have been brought in for another person who made this audit in this case, is that correct?

A. I understand that cancelled checks and bank

(Testimony of Harold Parsons.)

statements were made available but I did not examine them.

Q. That is the point I wanted to establish—he made no direct refusal to bring in what records he had, to you? A. No, sir.

Q. In the course of your investigation of Mr. Powell's affairs, did you find any direct attempt by him to cover up transactions?

Mr. Andrews: I object to that on the ground that it calls for a legal conclusion.

Mr. Jones: I will rephrase the question. [23]

The Court: Yes, that could be determined from the facts.

Q. Mr. Parsons, did you ever find any evidence of Mr. Powell having destroyed records?

A. No.

Q. Did you find any evidence of false records?

A. No.

Mr. Jones: That's all, your Honor.

Redirect Examination

By Mr. Andrews:

Q. In respect to Mr. Powell's statement that he was suffering from diabetes, did he indicate when he was suffering from diabetes, was that at the time of your investigation?

A. He indicated that it had been over a period of years.

Q. For how long? A. I don't recall.

Q. Do you know the nature or the kind of ac-

(Testimony of Harold Parsons.)

tivities carried on by Mr. Powell at the time of your investigation?

A. Yes, he was dealing extensively in real estate, both purchasing and selling real estate and renting real estate and a part of the time operating a number of gasoline service stations.

Q. Was he leading, would you say, an active business life? A. Very active.

Mr. Andrews: That's all.

Mr. Jones: No further questions. [24]

DANIEL S. FORSBERG

called as a witness by the Defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Andrews:

Q. What is your occupation, Mr. Forsberg?

A. Internal Revenue Agent.

Q. For how long have you been an Internal Revenue Agent? A. November, 1953.

Q. What was your position prior to that time?

A. Deputy collector.

Q. When did you become a deputy collector?

A. July, 1944.

Q. What are the duties of a deputy collector?

A. I start out with warrants in distraint, then into office audits, auditing tax returns right in the office and then I was sent out on field investigations to determine tax deficiencies and failure to file returns.

(Testimony of Daniel S. Forsberg.)

Q. Did there ever come a time, Mr. Forsberg, in the course of your official duties when you contacted, as deputy collector, Mr. Ora E. Powell?

A. Yes.

Q. What was the date of that contact?

A. I sent Mr. Powell a letter——

Q. What was the date of that contact?

A. January, 1946. [25]

Q. What were the circumstances under which that contact was made?

A. During those years we had received—the Treasury Department received from Banking institutions information reports concerning large currency transactions with their clients or others coming into the banks. Those, in turn, were passed on to our service and passed on or distributed to the various deputy collectors for investigation. One such information report came across my desk in regard to Ora E. Powell, and based on that I sent a letter to Mr. Powell in January of 1946 asking him to come in to this office in regard to his income tax matters and to bring along copies of his Federal Income Tax returns for the past several years.

Q. First I will ask you what the nature of the transaction was that caused you to investigate—in other words, what currency transaction was there which came to your attention?

A. Mr. Powell withdrew \$6,000.00 in cash from his account in the U. S. National Bank.

Q. Now, on the occasion of your first contact

(Testimony of Daniel S. Forsberg.)

with Mr. Powell, your first personal contact, what did he say and what did you say?

A. Mr. Powell came in after the filing period in March—he had been out of State—he didn't have his copies [26] of returns with him and he advised me at that time that he had not filed income tax returns since 1936.

Q. Did you request Mr. Powell to furnish you with any records?

A. My next question then was to furnish me with the books and records by which I might determine whether he had a tax liability or not.

Q. Did Mr. Powell produce such books and records?

A. He advised me that he had never kept any books or records during that period of time.

Q. What was the next step in your investigation?

A. Then I asked Mr. Powell regarding bank statements and cancelled checks. He had an account at the First State Bank of Milwaukee and at my request he produced cancelled checks and bank statements for all years in question. Checks were missing for the first half of 1937 only.

Q. And will you proceed with a brief summary of the type of investigation you conducted?

A. In the absence of records—I will have to divide the investigation into two periods. For the years 1937 to 1941, inclusive, Mr. Powell owned and operated several gasoline service stations. To determine the taxable profit from that operation I

(Testimony of Daniel S. Forsberg.)

used bank deposits, excluding all non-income items, as total receipts and I deducted cancelled [27] checks that were established to be ordinary and necessary business expenses, plus giving him an allowance for depreciation on known buildings and equipment. That was the basis for my finding of his taxable income for the period 1937 to 1941, inclusive. Now, in the years 1942 to 1945, inclusive, Mr. Powell leased these stations to his two sons, Lee G. Powell and Vincent O. Powell, and received from them rental income. Further than that, he had, at various times, during that period nineteen different properties that he rented, and also during that time he made in excess of thirty real estate sales, farms and residences, and also he had interest income on contracts and commissions from the sale of real estate. Now, for that income for that period I went through the books of Lee G. Powell and Vincent O. Powell to determine the rental income they had paid their father for those service stations and I also checked that with the income tax returns that they had filed. It agreed and I used that as his income for the service stations. It was necessary in view of the lack of records and the failure to obtain the deeds, mortgages and contracts to assist us to go to the County records of Multnomah, Clackamas, Washington, and Marion Counties to establish what property, if any, the taxpayer had owned during that period and what properties he had sold. From the tax rolls we went to the addresses of [28] various people and inter-

(Testimony of Daniel S. Forsberg.)

viewed them, checked with people that had bought, people that had rented and checked their contracts where they were available, to determine the profit on the sale of real estate, the rental income and the interest income on contracts. Mr. Powell obtained a broker's license in January of 1943—a real estate broker's license and he received commissions in his own right, also commissions working for other real estate brokers and I based the commissions taken on an estimate given to me by Mr. Powell, as far as the commissions were concerned. I knew part of them from the actual wage slips that he received. So then we determined real estate sales, the profits, the rents—rental income, interest on contracts from an extended investigation necessary to contact the people involved in those transactions.

Q. What was the total amount of taxable income which you computed for the years 1937 to 1945?

A. In excess of \$118,000.00.

Q. Now, you stated that you determined the income from the gasoline stations owned by Mr. Powell for the years 1937 to 1941 by analyzing the bank deposits and subtracting certain cancelled checks. Was this method the one subsequently used as a basis for the deficiencies in income tax asserted by the Commissioner of Income Revenue?

A. Later the taxpayer protested my findings and I believe [29] that during that period the next examining officer used deposits and—

Mr. Jones: I object, your Honor, to this line of

(Testimony of Daniel S. Forsberg.)

testimony, testifying as to what someone else did. He cannot testify to acts of his successor.

The Court: That would seem to be true.

Q. I would like to limit the question, your Honor, to this: Was the figure which you arrived at by using the bank deposits and cancelled checks method for the income from the gas stations for the period of 1937 to '41, was that the same figure that was ultimately used by the Commissioner of Internal Revenue in assessing the deficiency in income tax?

A. No, sir.

Q. Did the taxpayer agree that your method provided an accurate computation of income from the gas stations?

A. He had nothing to say on that; he voiced no opinion either way.

Q. You said something about a protest, who was the protest made by?

A. To me he made no such statement at the time.

Q. Do you, of your own knowledge, know whether any protest was made to anyone with respect to that method which you used?

A. He took his legal rights and made a protest, yes, against the findings that I had made. [30]

Q. How long did your investigation take, Mr. Forsberg?

A. My part of the investigation, and my time only, was in excess of twenty-seven working days. That was due, in part, to the fact that we had all of this ground to cover and all of these people to

(Testimony of Daniel S. Forsberg.)

interview and it took considerable time to get all this information together.

Q. Aside from the cancelled checks and the bank statements, what documents and information, if any, was made available to you by Mr. Ora E. Powell?

A. He made available to us specific contracts upon our specific request, after it became apparent that we had all the information regarding that particular sale.

Q. Did you ever make any general request for contracts or information?

A. Yes, sir, we certainly did.

Q. And what was his response to that request?

A. That he kept no such records and that he had no such records, and the general statement to the effect that he didn't see why he should, more or less, jeopardize himself in any way. As far as getting contracts and deeds and that, it became evident that he had them all the time but we were not given them until we specifically asked for each one as we discovered them.

Q. Did Mr. Powell ever state to you, at any time, any reason for his failure to file income tax returns for the years 1937 to 1945? [31]

A. Yes.

Q. What was the reason he gave?

A. At least on two occasions and in the presence of the joint examining special officer, Parsons, the taxpayer said that he didn't like the present administration. He didn't believe in the way the Coun-

(Testimony of Daniel S. Forsberg.)

try was being run and he didn't believe in paying income taxes, and he was strongly thinking of getting his things gathered together and moving out of the country and going to South America where he didn't have to pay taxes.

Mr. Jones: I move that latter part be stricken as not responsive——

The Court: It may stand.

Q. Did he ever state any other reason?

A. To me, he gave one other reason—that he didn't have the time and, therefore, neglected to do it.

Q. Did he ever say anything to you about being too sick to file? A. No, sir.

Q. Did he ever say anything to you which indicated to you that he did not know of the requirement for filing Federal income tax returns?

A. No, sir.

Q. At the time of your investigation, was Mr. Powell leading an active or an inactive life?

A. Very active. [32]

Q. Very active?

A. Yes, in fact most of his income came in the latter years of the investigation. His greatest profit was from the years 1942 to '45.

Mr. Andrews: I have no further questions.

(Testimony of Daniel S. Forsberg.)

Cross-Examination

By Mr. Jones:

Q. It is true that when you requested Mr. Powell to furnish what records he had such as checks, bank statements and so forth, he brought those forth willingly, did he, for that period?

A. Upon my request for bank statements and cancelled checks he produced them, yes, sir.

Q. And upon your request for specific deeds he produced them, is that correct?

A. On our specific request, yes, sir.

Q. He never refused to produce any document you asked him for, is that correct?

A. Not when we would identify what we wanted, no, sir.

Q. You made specific requests upon Mr. Powell that he furnish books and records, is that correct?

A. Yes, sir, I did.

Q. And he made the statement that he had no formal books or records?

A. He made the statement that he had not kept any books or records on his income for that period we had in question. [33]

Q. He did make the statement to you that he had had trouble getting professional help and that he didn't have time to do it, is that correct?

A. He made no statement regarding professional help to me. His statement was, as I have indicated, that he didn't have time—that he hadn't gotten

(Testimony of Daniel S. Forsberg.)

around to it and that he had neglected to do it, that was his statement to me.

Q. He made no statement regarding the possibility of hiring someone else to do it?

A. Not to me.

Q. Now, when you went through the books of Mr. L. G. Powell and V. O. Powell to ascertain the amount of these payments made by his sons to Mr. Powell, were you able to check those into his bank account?

A. I didn't trouble to do that, I didn't work with his bank account in those years, 1942 to 1945, inclusive. I took specific items. They showed the deductions on their books and they showed it on their return and that was good enough for me.

Q. Now, in your report of your investigation, did you find that Mr. Powell had destroyed any records? A. He said he kept no records.

Q. What I was referring to was cancelled checks and the normal subsidiary records that you find in the taxpayer's possession. [34]

A. The cancelled checks, as I stated before, were all there, and the bank statements except for the first half of 1937, when the checks were missing.

Q. Did you find any evidence of any attempt on his part to alter any of these records?

A. There was no alteration of any of the bank statements or the cancelled checks that I examined; no, sir.

Q. Did you find any attempt on the part of Mr.

(Testimony of Daniel S. Forsberg.)

Powell to alter or change or conceal any real estate contracts?

A. He certainly never came forward to give us the information that we asked for.

Q. That isn't the question that I asked. Did he make any attempt to conceal or alter these?

Mr. Andrews: I object to that insofar as he is being asked concerning an attempt to conceal, there could be many acts that could be regarded by one person as an attempt to conceal and not by another person.

The Court: I think that is a matter for the Court to decide from the evidence.

Q. Was there any attempt to conceal any of these real estate transactions, on the part of Mr. Powell? A. When I asked——

The Court: I think you should just bring out the facts—there was an objection to this same question and I sustained it. [35]

Q. Were there any alterations on these real estate contracts?

A. The contracts that were given to us, that we requested seemed to be in good order.

Q. So in your investigation you found no destruction of records, and no alterations of subsidiary records and these real estate contracts which you stated?

A. The contracts were in order that we saw. The bank statements and cancelled checks except for the checks for 1937—the first half—were in order, there was no destruction of those and nothing where I

(Testimony of Daniel S. Forsberg.)

could see that they had been tampered with in any way.

Q. You were satisfied at the time of this investigation—let me put the question this way: Did you go to the bank and request any evidence of these checks from the bank from their records?

A. I had no need to. I already had his cancelled checks.

Q. I mean for the first part of 1947?

A. You mean '37?

Q. Yes, '37.

A. No, I didn't go to the bank and ask for those, sir.

Q. Then you were satisfied that these checks had been inadvertently misplaced and that there wasn't any attempt to conceal them?

Mr. Andrews: I object to that as calling for a conclusion. He certainly doesn't know what checks were inadvertently misplaced. [36]

The Court: Yes, that's right.

Q. Did Mr. Powell account for the absence of the checks for the first part of 1937 at the First State Bank of Milwaukie?

A. They never were given to me, sir.

Q. Did you make any attempt to secure them, Mr. Forsberg?

A. I asked Mr. Powell for them and the second time he said that he would look for them, as I recall that. I wasn't disturbed in any way. I had sufficient checks and they were missing and I took it for granted that nobody could find them.

(Testimony of Daniel S. Forsberg.)

Q. In other words, you were satisfied in your own mind that they were unavailable?

A. Yes, sir.

Q. During the course of your investigation, did you find that Mr. Powell had filed Federal income tax returns prior to the taxable year 1937?

A. Yes.

Q. For what years?

A. Delinquent returns were received in the collector's office in May, 1937, for the years 1933, 1934, '35 and '36.

Q. Do you recall the amount of the taxable net income on those returns?

A. I do not.

Q. Your investigation of these returns filed prior to 1937, did your investigation disclose whether those were [37] voluntarily filed?

A. I think the records at that time on that investigation were missing, so we don't know whether Mr. Powell brought those in or whether our department picked them up, but that they were delinquent there is no doubt.

Q. You couldn't testify positively whether he had filed those on a request from the Internal Revenue Service or filed them voluntarily on his own motion?

A. No, sir; there is nothing in the evidence to date that would show us those facts.

Q. You testified that you worked twenty-seven days—working days reconstructing the data on the computation of the net taxable income, is that correct?

(Testimony of Daniel S. Forsberg.)

A. In excess of 27 working days, my time only.

Q. And that was reconstructing the data for the taxable years 1937 through 1945? A. Yes, sir.

Q. In other words, your time was spent in checking the records of the various counties in the County Courthouses to establish these mortgages and the like and checking his bank statements and checking the books of L. G. Powell and V. O. Powell, is that right?

A. A copy of my "daily" will indicate that I made numerous contacts with individuals trying to trace these various transactions of rental income and sales of property, besides contacts with Lee G. Powell and Vincent O. [38] and their books, besides contacts with real estate firms regarding commissions, beside checking county records to no end.

Mr. Jones: That's all.

Redirect Examination

By Mr. Andrews:

Q. Did Mr. Powell ever voluntarily make any documents or information available to you?

A. Voluntarily, no, sir.

Q. Then it was always at your specific request that documents or information was furnished?

A. Yes, sir.

Q. What would Mr. Powell require from you before he would go to his records and pull out any particular contract specified by you?

A. Well, we would tell him of the property and

(Testimony of Daniel S. Forsberg.)

the party he sold it to and told him that we would like to see the contract if he had it available. We would always identify what we wanted.

Q. Then the information which you would already have was the piece of property involved and the name of the purchaser? A. Yes, sir.

Q. Anything about the price?

A. We might have the price and we might not.

Q. And what about the date of transfer?

A. Well, on the contracts, you see, most of the contracts [39] were not recorded, and it took some uncovering to determine who had bought that property. In some instances the people didn't seem to have a copy of the contract. Once we were able to determine that a sale actually existed and we asked him specifically about it he brought it forward to us.

Q. Your testimony is that the only time he produced any document showing a sale of any real property was when you had the name of the party to the transaction, the date of the transaction and the particular piece of property involved?

A. Yes, I asked him when I found out about these real estate deals, to bring in his deeds and his contracts and he didn't do it, only after we uncovered them right out one by one did we get them.

Mr. Andrews: That is all, Mr. Forsberg.

(Testimony of Daniel S. Forsberg.)

Recross-Examination

By Mr. Jones :

Q. But he never at any time refused to produce a document that you asked for specifically?

A. No, sir; except that he, in a general way, did. He never brought these in when I asked him for all the deeds and contracts he had. He just never replied to us, he never came in with the information.

Q. But you were able to determine from other evidence the existence of the contract? [40]

A. In some instances, yes. We might not have the information and the contract that was brought in assisted us in that. I might say that whereas I spent twenty-seven working days on this case, if that information had been given to me or made available to me in working on the case, I could have probably done it in two weeks.

Q. That is just your opinion?

A. Well, I work with that stuff pretty regularly, I should know pretty well what it takes to do it.

Q. But you were able to identify the contracts you asked for from other records, is that correct?

A. Yes, sir.

Mr. Jones: No further questions.

The Court: We will take a recess for fifteen minutes.

February 7, 1956—11:30 A.M.

EDWARD A. MAIER

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Andrews:

Q. What is your occupation, Mr. Maier?

A. I am a certified public accountant.

Q. Are you in business for yourself or are you employed by some organization?

A. I am in business for myself—a [41] partnership.

Q. How long have you been in business for yourself? A. Since the first of this year.

Q. What was your occupation prior to the first of the year?

A. I was an Internal Revenue Agent.

Q. In the course of your official duties, Mr. Maier, did you ever have occasion to contact Mr. Ora E. Powell?

A. I had contact with the case of Ora E. Powell. I do not believe that I actually contacted Mr. Powell.

Q. What was the date that you entered the Powell case?

A. It was some time in 1950. Early in 1950.

Q. What were your duties in connection with that investigation?

A. Mr. Powell had protested the findings of the

(Testimony of Edward A. Maier.)

prior examination and it was my duty to make a re-examination.

Q. What was the result—first, what were you re-examining?

A. Re-examining the records that were available or that were made available at this time.

Q. How did you go about making that examination?

A. Another certified public accountant was handling the case at that time and I made contact with him. He had certain records available at his office which I then proceeded to examine.

Q. What records were available at that time?

A. Principally they were work sheets that had been made up by this accountant at that time and the cancelled checks and contracts and so forth that the taxpayer had. [42]

Q. Do you know of any reason for the certified public accountant's co-operation at that time?

A. I know that in view of the protest, that the taxpayer had to make—well the taxpayer had to come forward and give some help in making a determination.

Q. Can you think of any other reason for the introduction of a certified public accountant at that time?

Mr. Jones: We object to that question, your Honor. He is not stating a fact—

The Court: You may ask if he knew of any other reason.

Q. Do you know of any other reason for this co-

(Testimony of Edward A. Maier.)

operation of the certified public accountant at that time?

A. Due to the fact, I believe, that there had been a trial of the taxpayer on the issue of wilful failure to file return.

Q. Was that a civil or criminal proceedings, do you know? A. I think it was criminal.

Q. Do you know the outcome of that proceedings?

A. I know in the record it shows that the taxpayer—

Mr. Jones: I object, your Honor, he is not testifying from direct knowledge.

The Court: There is a statement of facts in the pretrial order.

Q. Had you finished your answer?

A. I know that in the records that were available to me [43] showed that the taxpayer had either entered a plea of guilty or had been found guilty. I think one of the provisions was that he co-operate in finding a determination of the correct tax liability at that time.

Q. At that time, then, a certified public accountant was engaged by the taxpayer to co-operate with you? A. That is my understanding of it.

Q. Did you ever ask either Mr. Powell or the accountant for any books, any ordinary books and records?

A. I don't recall that I ever asked for any standard books, as we know them. I think the record shows that everything that was available to me

(Testimony of Edward A. Maier.)

—that in them there was no standard books available, no formal books.

Q. How much time did you spend on your examination?

A. I don't actually remember. I would think that it was probably about a week or perhaps a day or two—not over a week.

Q. What changes, if any, did you make in the prior examination report?

A. The taxpayer had available at this time, I believe, certain records which he did not have prior thereto, or had not made them available prior to this time, which were to his benefit insofar as they reduced the tax liability that had been set up.

Q. What was the over-all taxable income for 1937 to 1945 [44] as finally determined by you?

A. I don't know, of my present knowledge, I don't know.

Q. Do you know whether or not the reports you turned in formed the basis for the deficiency ultimately assessed by the Commissioner of Internal Revenue?

A. Yes, it was.

Q. What were those records you described as having not been made previously available, which were made available at the time of your examination. What kind of records were they?

A. Records pertaining principally to expenses—yes, with regard principally to expenses.

Q. What was the nature of the records. Were they notes, scribbled pieces of paper, cancelled checks or what kind of records were they?

(Testimony of Edward A. Maier.)

A. I don't actually remember the exact details.

Q. How did you go about computing the income of the taxpayer from the gasoline stations which he owned for the period 1937 to 1941?

A. The prior investigation had been made on the basis of bank deposits, less expenses which had been substantiated and at this time with the help of the accountant we determined or tried to determine the actual gasoline sales and oil sales that had been made and from that determine, on the basis of profit per gallon, the actual profit involved in those sales. After having arrived [45] at the gross profit we then made allowances for expenses which the taxpayer incurred for which he had records either by his cancelled checks or which were reasonable on the basis of the facts that were available.

Mr. Andrews: Nothing further.

Cross-Examination

By Mr. Jones:

Q. You have testified that when you came into this particular case that you reduced the tax liability over the prior determination, is that correct?

A. That's right.

Q. And you also testified that your reason for this reduction was because of the existence of additional records. Could you describe these records to the Court?

A. Perhaps there were no additional records in that manner, I am not positive.

(Testimony of Edward A. Maier.)

Q. In other words, you are not positive whether you had any more records than the other examining agent before you?

A. I believe they had found additional contracts, deeds and so forth.

Q. But no additional records for expenditures and things like that?

A. Except insofar as the reasonableness of the situation would point to.

Q. In other words, you applied the rule of normal expenditures [46] of a man engaged in like activity, is that correct? A. Yes.

Q. Of these expenditures you made quite a substantial allowance, did you not?

A. I don't believe there was a very substantial allowance, I think it was rather nominal.

Q. You don't remember the exact details of the records you examined at the time you went in for your re-examination, is that right?

A. Not the exact detail of that.

Q. You do remember that there were no formal books or records? A. I do remember that.

Q. In your conferences with the certified public accountant you reviewed substantially the same records in arriving at your figures, is that correct?

A. I don't understand the question.

Q. You have testified heretofore that you examined work sheets prepared by the accountant for the taxpayer, is that correct?

A. That is correct.

Q. And in your redetermination you used essen-

(Testimony of Edward A. Maier.)

tially the same figures that the accountant used and the same records to arrive at those figures, is that correct?

A. I had available, not only the accountant's records but also the records that the Internal Service had at that time from the records of the case. They were used jointly in [47] arriving at the correct income.

Q. There was no great divergence between the accountant's result and the result of the agent that examined these records prior to your determination other than the adjustments that you made, isn't that correct? A. That would be right.

Q. As I understand it, the principal difference was on depreciation schedules and reasonable expenses because you had other records to substantiate these deductions, is that correct?

A. Some of the reasonable deductions but I am not sure on the depreciation whether any adjustments were made or not.

Q. In other words, you don't remember the exact details of your adjustments, is that correct?

A. I haven't given it any considerable review. It is in my report but I don't recall the details.

Mr. Jones: No further questions.

Mr. Andrews: The Government rests, your Honor.

The Court: In view of the fact that we are adjourning for lunch a few minutes early, we will take up fifteen minutes early, that will be at 1:45.

(Testimony of Edward A. Maier.)

Mr. Jones: At that time I would like to make a motion.

The Court: Could you make your motion now, before we adjourn, we have time for that? [48]

Mr. Jones: I would like to make a motion for a directed judgment on evidence as it has been submitted by the Counsel for the Government in this case. I am of the opinion that the Government has not sustained their burden of proof to prove fraud in this particular case. They have shown no evidence of an attempt at concealment, no overt act, no direct act to conceal income, all they have shown is passive conduct on the part of the taxpayer, namely, his failure to file tax returns. There are at least two cases in the Federal Court that require more than a failure to file returns to sustain a charge of fraud——

(Remarks of counsel on motion.)

The Court: I will deny the motion, but I will reconsider the entire matter at the end of the case, and I will go into that just as if I had not ruled on this motion. Court will now adjourn until 2:00 o'clock this afternoon.

February 7, 1956—2:00 P.M.

LEE G. POWELL

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Powell, will you state your residence?

A. 6715 Highland Drive, Vancouver, [49] Washington.

Q. Will you state your relationship to the deceased taxpayer, O. E. Powell, in this case?

A. He was my father.

Q. What is your business, Mr. Powell?

A. I am in the wholesale gasoline and fuel oil business.

Q. How many establishments do you have in the conduct of that business?

A. Oh, we operate approximately thirty-five service stations and sell twenty-four or twenty-five distributors.

Q. How long have you been in business, Mr. Powell?

A. I have been in the oil business since I was out of college, which was in 1928.

Q. How much college training did you have, Mr. Powell? A. I had two years in college.

Q. Will you state the date of the death of your father, O. E. Powell, the deceased taxpayer in this case?

A. My father passed away in July, 1954.

(Testimony of Lee G. Powell.)

Q. What was his age at the date of his death?

A. He was seventy-three.

Q. Seventy-three years old—where was your father born?

A. He was born in Ohio.

Q. Are you acquainted with the educational background of your father?

A. Yes.

Q. What was that educational background?

A. He had equivalent to a high school [50] education.

Q. How long was your father a resident of the State of Oregon?

A. We moved to Oregon in 1921.

Q. When your father moved to Oregon, what business did he engage in?

A. He went in the service station business when we first came here.

Q. How extensive was his business to begin with?

A. He built one service station.

Q. How large a service station was this?

A. In those days it was a pretty small business; it was on a 100 by 100 lot with three pumps.

Q. Three gasoline pumps on a lot?

A. Yes, sir.

Q. Did he subsequently enlarge his business?

A. Yes, he did. He acquired other locations later.

Q. What would you estimate as the maximum number of locations that he had in the service station business?

A. I think the most he had at any one time was seven service stations.

(Testimony of Lee G. Powell.)

Q. Did he do anything, did he engage in any other business activities aside from the conduct of these service stations?

A. Yes; he dabbled in real estate quite extensively besides the oil business.

Q. Could you tell the Court about what year he started to [51] engage in the real estate business?

A. Actually he had a real estate broker's license, and I don't recall exactly the year but I would say somewhere around '41 or '42.

Q. In the conduct of this business, did your father ever engage the service of a regular bookkeeper?

A. I don't recall him ever having a regular bookkeeper, no.

Q. Do you know who kept his books and records generally?

A. I think he kept them himself.

Q. Kept them himself?

A. Yes, I think so.

Q. Now, did your father have any church affiliations?

A. Yes, he did; he belonged to a church.

Q. Did he attend church regularly?

A. Almost every Sunday, I would say.

Q. Almost every Sunday when he was able?

A. Yes.

Q. Did he participate actively on committees in the church, any particular committees?

A. Yes; when they built a new church, I am positive that he was on the finance committee.

Q. Did he actively participate in any other community affairs?

(Testimony of Lee G. Powell.)

Mr. Andrews: Your Honor, at this point I would like to object on the ground that this is very obviously immaterial to the issues in this case.

The Court: I think it is, but this is a [52] matter before the Court and I will let him go ahead.

Q. Was your father active in politics?

A. To a certain extent, I would say yes.

Q. Did he actively engage in political activity or were his more of strong political beliefs?

Mr. Andrews: Now, I object to that, your Honor, as being incompetent, irrelevant and immaterial.

The Court: Yes, I think so, but I will let him answer.

A. He participated in certain campaigns where he was fairly well sold on the candidate. I know of a few contributions that he made and a small amount of campaigning but he had never run for any office or been what you would call very active in politics.

Q. Did he have strong political beliefs?

A. Yes, he did.

Q. How close were you to your father?

A. Well, we were very close, we were in the same business. We have always been a family—not a large family, but two sisters and a brother, we had lots of family affairs and dinners. We were very close.

Q. You visited his home? A. Yes.

Q. Often? A. Yes.

Q. And he yours? A. Yes. [53]

Q. During the course of these visits from the

(Testimony of Lee G. Powell.)

year 1937 to the year 1945, did you often engage in a discussion of business activities?

A. Yes, we did.

Q. During those years in question, was the subject of taxes ever discussed? A. Yes.

Q. What statements did he make to you, during those years, concerning income taxes?

A. I knew that he wasn't paying his income tax and I asked him about it and told him that he should be paying, that it was the thing for him to do, and he said he knew it but that he didn't pay because he didn't believe in the way that the Government was wasting the money.

Q. Did your father ever make any direct statement concerning his conviction on taxes?

A. Yes.

Q. What were those statements?

A. That he believed in taxation but he didn't believe that the Government should waste the money.

Q. Did your father make these statements freely and voluntarily to all other members of your family? A. Yes.

Q. Are you aware of any outsiders that he might have made these statements to?

A. I don't recall any outsiders. [54]

The Court: I guess this was before he could have read any news dispatches about a Governor's actions.

Mr. Andrews: Yes, your Honor.

Q. Then his statement for failure to file these returns was mainly based upon political convictions,

(Testimony of Lee G. Powell.)

is that correct? A. Yes, that's correct.

Q. What was your advice to your father concerning his failure to file tax returns and pay the taxes?

A. My advice was for him to pay it. I knew that he should pay it.

Q. What was his reaction when you urged him to do this?

A. His reaction was that he would do that when and if he felt it was time to do it.

Q. Over what period of time did these discussions take place and with what frequency?

A. I think about every time I had to pay income tax, over the period, I would say, from '37 to '45.

Q. Did you ever have any business dealings with your father? A. Yes.

Q. Could you advise the Court of the extent of these business dealings with your father?

A. He decided to get out of his service station business and I leased five service stations that he owned. I believe the first year was 1941. [55]

Q. 1941?

A. I am still leasing them today, from my mother.

Q. You paid regular rentals to your father?

A. That's correct, yes, sir.

Q. During that time, depending upon the conditions? A. That's correct.

Q. And you presently are leasing these stations from your mother, is that correct?

A. That's correct.

(Testimony of Lee G. Powell.)

Q. Now, do you recall when you made rental payments to your father, how you made those payments? A. Yes, once a month.

Q. Were they made by cash or check?

Mr. Andrews: I object to that, your Honor. I believe that the cancelled checks would be the best evidence if it was by check.

The Court: He may answer whether they were made by cash or check.

A. They were made by check.

Q. Now, in your business dealings with your father, was there any attempt or any suggestion by him to make these payments by cash?

A. Never was there any request like that made.

Q. Was there ever any attempt by your father to get you to conceal the source of these payments?

A. No, sir. [56]

Q. Was your father a man of strong religious beliefs? A. Yes, he was.

Q. Was your father a man of strong political beliefs? A. Yes.

Q. Was your father a man whom you would consider to be a strong-willed man with the ability to make up his own mind?

A. He certainly was.

Mr. Jones: No further questions.

(Testimony of Lee G. Powell.)

Cross-Examination

By Mr. Andrews:

Q. I believe you testified that your father kept his own books and records?

A. To the best of my knowledge that's true.

Q. Do you know of a man named Willoughby?

A. I believe I have met a man by that name?

Q. Where did you meet him?

A. At my father's home.

Q. Do you know whether or not he ever worked for your father?

A. He may have made out some tax returns. I don't know that he did any specific bookkeeping. He might have made a summation of the year's business. I don't know, but I don't believe that he was ever hired as a regular bookkeeper. I met him on one or two occasions.

Q. You say that you paid your father by checks?

A. Yes, sir. [57]

Q. Do you have those checks? A. Yes.

Q. In the courtroom with you?

A. No, I don't.

Q. What happened to them?

A. I think I could produce them clear back as far as '41.

Q. Is it your testimony that you don't have the checks with you in the courtroom?

A. I don't have them with me. I would have to have a truck to bring them in here, I am sure.

(Testimony of Lee G. Powell.)

Q. Would you need a truck to cover just the checks you made to your father for the lease of gas stations for the period 1942 to 1945?

A. I retract that. I wouldn't need a truck, but I would need some time to produce the checks because that goes back a long ways and it would be a big volume of checks.

Q. How old is your mother at this time?

A. I believe my mother is seventy.

Q. And how many sons does she have?

A. Two.

Q. Is it a fair statement to say that if there is any recovery in this case the amount of the recovery would ultimately come to you?

A. No, that isn't true.

Q. Why isn't that true?

A. I have two sisters that are more in need of the money than my brother and I.

Q. Then there are four of you?

A. That is correct. [58]

Mr. Andrews: No further questions.

Redirect Examination

By Mr. Jones:

Q. Have your books and records ever been examined by any Internal Revenue Agent?

A. Yes, they have.

Q. What Internal Revenue Agent examined your books and records?

A. I don't remember both of their names but I

(Testimony of Lee G. Powell.)

believe that Mr. Forsberg was one. I believe the other passed away.

Q. Is that Mr. Forsberg the one that is present in Court? A. I think so.

Q. Did Mr. Forsberg ever question you about payments made to your father by you?

A. Yes.

Q. Did Mr. Forsberg ever make a determination of a deficiency in your income tax for any years in question, 1937 to 1945, inclusive?

A. They went through my books and they asked me lots of questions. I don't recall the questions, but they asked me lots of questions.

Q. Mr. Powell, what would you estimate the present fair market value of all of your assets?

A. Of mine?

Q. Yes, just a rough estimate.

A. Four hundred thousand dollars. [59]

Q. Then in relationship to your total net worth any possible bequest that you might possibly get from your mother would not amount to very much to you? A. That is true.

Q. From a financial viewpoint, other than personal feeling? A. That's true.

Q. The amount involved in this case would not be in excess of \$16,000.00, or \$4,000.00 to you, assuming that your mother left one-fourth of her estate to you, the \$4,000.00 additional wouldn't mean too much to you in relation to your total net worth? A. That's true.

Mr. Jones: That's all.

Mr. Andrews: No further questions, your Honor.

BERNARD MILKES

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Jones:

Q. What is your name?

A. Bernard Milkes.

Q. What is your occupation?

A. I am a certified public accountant.

Q. Your residence, Mr. Milkes?

A. 7622 Southeast 36th, Portland.

Q. Would you state to the Court your educational background? [60]

A. Well, I am certified as far as my accounting is concerned, and I attended the University of Minnesota.

Q. You are a graduate of the University of Minnesota?

A. I didn't quite graduate, but I did pass the CPA examination.

Q. And are certified as a public accountant?

A. Yes, have been for ten years, and teach accounting.

Q. You teach accounting?

A. Yes, I teach accounting at Portland State if that will help the record any.

Q. How long have you been engaged in the accounting business?

A. Probably twenty years.

Q. Twenty years, has that been as a principal all of that time?

(Testimony of Bernard Milkes.)

A. No. I was in private accounting for about eight years and then I practiced with a national accounting firm for about three years and the balance of the time I have been in my own business.

Q. What National Accounting Firm were you with?

A. Peet-Marwisk-Mitchel and Company.

Q. Were you acquainted with Mr. Ora E. Powell, the deceased Plaintiff in this case?

A. Yes.

Q. In what connection were you acquainted with Mr. Powell?

A. In connection with these tax affairs that are under discussion.

Q. What was your first contact with Mr. Ora E. Powell? [61]

A. Mr. Powell called me in and stated that he wanted me to reconstruct his records, that he had had this tax situation and that I was to work on the reconstruction of the records with the attorney in the case.

Q. What date was your first contact with Mr. Powell? Can you tell the Court the year?

A. I can't remember the date at all. I would say that it was somewhere in the forties.

Q. Late 1940's?

A. I would think so; the case covers '41 to '48, doesn't it?

Q. 1937 to 1945.

A. '45; well, then, I got in about '47, I would say.

(Testimony of Bernard Milkes.)

Q. Were you ever contacted by the Internal Revenue service concerning this case?

A. Yes, sir. I worked with two of the boys, at times, on this case, from the Internal Revenue.

Q. What agents from the Internal Revenue Service did you deal with on this case?

A. Mr. Forsberg and the man that testified this morning.

Q. Mr. Maiers? A. Mr. Maiers, yes.

Q. For the years 1937 to 1945, inclusive, did you compute the net taxable income of Mr. O. E. Powell?

A. Yes, to the best of our ability, from the records available.

Q. What method did you use to reconstruct the taxable net income for the taxable years 1937 to 1945? [62]

A. I went out to Mr. Powell's home and he furnished me with all of the papers that he had available which included all of the cancelled checks and bank statements, or copies of the bank statements that he had obtained from the bank, and also all various property tax—not property tax but property papers, that is, deeds and things of that nature and we tried to reconstruct records from that information.

Q. Did you have the opportunity to compare your results with the results reached by the Internal Revenue Service? A. Yes, I did.

Q. How did your results compare with the results reached by the Internal Revenue Service?

A. Well, after we made some minor adjust-

(Testimony of Bernard Milkes.)

ments on the property transactions—while I had a couple of duplications and had missed a couple, we compared, and after that was over I would say that substantially the income figure was about the same.

Q. Then the adjustments that you made—you might have made a duplication of two pieces of property?

A. That's right.

Q. But your results were substantially the same as the Internal Revenue Service—your independent results were the same as those reached by the Internal Revenue Service?

A. Yes, that's right.

Q. Did you have a lot of trouble reaching these results? [63]

A. It took a lot of time as cases of that kind do when you don't have formal records. However, I wouldn't say that we had trouble.

Q. Were your results gained from the same records used by the Internal Revenue Service?

A. I don't know what records they used but I believe that my records on the property transactions were taken entirely from the deeds and contracts and things of that kind, whereas I understood that the Internal Revenue got some of their information from the actual records in the courthouse.

Q. During this period in question—after your first contact with Mr. Powell, how well acquainted did you become with Mr. Powell?

A. I would say quite well acquainted because I practically lived out at his place while we were making up the record.

(Testimony of Bernard Milkes.)

Q. Would you say that you knew him well enough to know his habits and peculiarities?

A. I think so, yes.

Q. Was Mr. Powell a man of strong beliefs?

A. Yes, I would say he was.

Q. In your opinion, was Mr. Powell a man of strong political convictions?

A. Yes, I would say he was.

Q. Would you say that Mr. Powell was a man of strong religious convictions? [64]

A. He definitely was.

Q. In your search of Mr. Powell's affairs, did you find any evidence of his having attempted to destroy any records? A. Absolutely not.

Q. Did you find any evidence of his having attempted to alter any records?

A. No, none at all.

Q. Did you have occasion to discuss with Mr. Powell his reason for not filing income tax returns for the taxable years 1937 to 1945?

A. Many times.

Q. Did Mr. Powell give any reason for his failure to file returns?

A. His statement was that he couldn't see any use in contributing to the Government when they were wasting the money.

Q. Did he ever voice any of his convictions about taxes to you?

A. Well, his conviction on taxes were that he knew that the Government had to have money, any governing body had to have money in order to exist.

(Testimony of Bernard Milkes.)

but that he couldn't see any point in payment so much more than they had to waste it. There was no question but what he believed in tax, but a reasonable tax.

Q. When Mr. Powell furnished these records to you for examination and recomputation, were these same records available to the Internal Revenue Service? [65]

A. To the best of my knowledge the records were the only records that were available and he had made no attempt whatever to hold back any records at all. I went out to his house and he brought out everything he had and it was up to me to dig through them and pick out what I wanted.

Q. Did you ever take these records to your office?

A. I had parts of them at my office, yes.

Q. When Mr. Maiers was in your office comparing these results, were these records available to him? Did you make these records available to him?

A. I don't think that question ever came up. We compared final results from my work papers to his work papers, but I don't think we ever actually went through any of the original records. To my knowledge there were never any records held back. I never had that experience.

Mr. Jones: Your witness.

(Testimony of Bernard Milkes.)

Cross-Examination

By Mr. Andrews:

Q. I believe you testified that you came to approximately the same result that Internal Revenue Agent Maiers, that is, the same figure that he came to in computing income tax deficiencies?

A. No, oh, no, in income; I changed that statement. I think the record will show that my statement was that we arrived at substantially the same figures in income. [66]

Q. Is that gross income?

A. Taxable income.

Q. What were the differences between you and Mr. Maiers?

A. There were no differences so far as I know, so far as the taxable income was concerned, that's what I said that we arrived at approximately the same figures using two different methods.

Q. Two different methods based on the same material, wasn't it?

A. Not necessarily, like I said in the record here. I think he got some of his information from the property records, but I don't know.

Q. And you got your information from what source?

A. From the contracts and various papers that you go through when you sell or buy property.

Q. Where in these contracts does it say anything

(Testimony of Bernard Milkes.)

about the amount of profit that brokers realize on a sale?

A. Well, we had amounts that he paid for the property, and the contracts show amounts that he sold the property for. Many of the properties he actually bought on contract and then also sold on contract and the information would be there for that.

Q. Some of these contracts were matters of public records and others were not?

A. That I don't know, I never checked the public records.

Q. You said that the Internal Revenue Agents checked them? [67]

A. I said that I thought they did.

Q. So if they did they were really checking the same material that you had?

A. Don't put words in my mouth; I don't know.

Q. I am asking you.

A. I don't know. All I said was that I thought they did.

Q. Then you don't know what they did?

A. No, I don't know what the Internal Revenue Agents did. I just know that we arrived at substantially the same figure.

Q. How did you arrive at the amount of income realized by Mr. Powell from the operation of the gas stations during the period from 1937 to 1941?

A. I took the checks that he had issued for the payment of the gasoline and then I called, I believe, one of the major gas companies and they furnished us with the prices that he had paid at that time for gas-

(Testimony of Bernard Milkes.)

oline and we divided one into the other to determine the number of gallons, and then we arrived, also by contact with the National Firms, the approximate selling price so that we knew how many cents per gallon were made in profit and thus arrived at our profit, and I believe that I discussed this matter with Mr. Maiers and we both agreed that it seemed reasonably fair.

Q. Then it was a complicated method?

A. I wouldn't say it was complicated. [68]

Q. Would you say it was simple?

A. Yes; it wasn't very hard.

Q. All you had to do was to call up some Gas Companies and project some figures and there you had it?

A. No; we had genuine cancelled checks from the bank that indicated actual purchases of gasoline, and in contacting the Gas Companies we knew the exact date that he had bought it and they keep the kind of records that would tell us the cost price and the selling price of gasoline at that time.

Q. At any rate, you were able to determine the income from the gas stations because the Gas Companies and the Banks kept good records?

A. I would say so, but quite often, in an accounting procedure where you are rebuilding past records, you make use of outside sources for information.

Q. You were hired by Mr. Powell to make a re-computation of his net income for the years 1937 to 1945?

(Testimony of Bernard Milkes.)

A. I wouldn't say a recomputation; I would say a computation.

Q. You took his money? A. Pardon.

Q. You took his money for that job?

A. I got paid for doing the work, yes. I get paid for all the accounting work I do, or most of it.

Q. You say that you found no attempt on his part to conceal any record or any alterations of any kind—were you looking for any? [69] A. No.

Mr. Andrews: That is all.

Redirect Examination

By Mr. Jones:

Q. Mr. Milkes, in your work in accounting you are primarily looking for—one of your primary purposes is looking for discrepancies in records, is that correct?

A. Yes, I would say that is correct, not looking for fraud or anything like that but looking for errors in recording the information for accounting purposes—for tax purposes and I might say, incidentally, for fraud also.

Q. It is your nature to observe in going through data for accounting, any irregularities such as alterations? A. Yes.

Q. And it is your practice to observe any destruction of records or subsidiary records?

A. Well, sure, if there is any evidence of it.

Q. Then, chances are, in the course of your examination, if there had been any alterations or destruc-

(Testimony of Bernard Milkes.)

tion of these records it would have come to your attention? A. Yes, sir.

Q. Were the subsidiary records that were made available to you for the taxable years 1937 to 1945 adequate to fairly reconstruct the income and expenditures of Mr. Ora E. Powell?

A. Substantially so, yes.

Mr. Jones: Your witness. [70]

Mr. Andrews: No further questions.

Mr. Jones: I would like to call Mr. Lee Powell to the stand.

LEE G. POWELL

recalled as a witness for the Plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Powell, you have heretofore testified that your Father had a real estate Broker's license?

A. That's true.

Q. In his real estate transactions, to the best of your knowledge, did your Father ever employ a Broker or pay a Broker for handling real estate transactions?

A. It is hard for me to answer that because he had lots of transactions that I didn't follow too closely. There is a possibility that he bought through another broker or sold through one. I know that it is common practice for brokers to co-operate and split commissions and so forth.

(Testimony of Lee G. Powell.)

Q. But he did have a broker's license?

A. Yes, he did.

Q. During a portion of these years, and did handle his own real estate transactions? A. Yes.

Q. Are you aware of a substantial number of transactions that he handled himself and paid no real estate Broker's [71] commission?

A. Yes; I know of quite a few.

Mr. Jones: No further questions.

Mr. Andrews: Nothing further.

Mr. Jones: Your Honor, we rest our case.

The Court: Does the Government have anything further?

Mr. Andrews: Nothing further except that I believe that Mr. Jahnke would like an amendment to the pretrial order. I understand that under local practice the Pretrial order is a part of the record.

The Court: Yes, it is.

Mr. Jahnke: We would like to orally amend the pretrial order so that the plaintiff may make the additional contention that on the amount of any recovery which it may be awarded in this case, the recovery will bear interest in the statutory rate, and in the statutory amount, and we would further stipulate that if there was any recovery in this case that the amount of the recovery should be subject to recomputation by the Internal Revenue Service, following which a stipulation of judgement would be filed with the Court.

(Further statement of Court and counsel as to procuring transcript and filing briefs.)

Mr. Jones: For the record I would like to reassert the motion I made at the close of the Governments case. [72]

The Court: Yes, it is understood that it is reasserted and the Court will, as suggested before, take the whole matter under consideration in the final determination of the case. [73]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am an official Court Reporter for the United States District Court, and

I further certify that I am the Reporter who took the testimony and proceedings given and had in the above-entitled matter, in shorthand, and thereafter transcribed the same into longhand (typing), and

I further certify that the foregoing transcript, consisting of pages numbered to 73, is a true and correct transcript of said testimony and proceedings.

In Witness Whereof, I have hereunto set my hand this 17th day of April, 1956.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed February 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pretrial order; Opinion; Findings of fact and conclusions of law; Judgement; Notice of appeal; Bond for costs on appeal; Statement of points on appeal; Designation of contents of record on appeal and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7837 in which Grace M. Powell, Executrix of the Estate of O. E. Powell, Deceased, is the plaintiff and appellant and Ralph C. Granquist, District Director of Internal Revenue, is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the reporter's transcript will be forwarded as soon as it is filed in this office and the exhibits will be forwarded at a later date.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 14th day of February, 1957.

[Seal] R. DeMOTT,
 Clerk;

By /s/ THORA LUND,
 Deputy.

[Endorsed]: No. 15447. United States Court of Appeals for the Ninth Circuit. Grace M. Powell, Executrix of the Estate of O. E. Powell, Deceased, Appellant, vs. Ralph C. Granquist, District Director of Internal Revenue, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: February 18, 1957.

Docketed: February 25, 1957.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15447

GRACE M. POWELL, Executrix of the Estate of
O. E. Powell, Deceased,

Appellant,

vs.

RALPH C. GRANQUIST, District Director of
Internal Revenue,

Appellee.

STATEMENT OF POINTS ON APPEAL

In accordance with Subsection 6 of Rule 17 of the rules of this court, the following is a statement of the points upon which the appellant intends to rely:

I.

The Federal District Court of the United States for the District of Oregon, erred in concluding and holding that the deficiencies in income taxes assessed by the Commissioner of Internal Revenue against Ora E. Powell and collected by the appellee herein for the years 1937 through 1945, inclusive, were due to fraud with intent to evade tax within the meaning of Section 293(b), Internal Revenue Code of 1939, and that the collection of \$12,880.39 from Ora E. Powell and/or the appellant herein by the appellee as the amount of the penalty as imposed by Section 293(b), Internal Revenue Code of 1939,

for the years 1937 through 1945, inclusive, were proper, by reason of the fact that the defendant-respondent failed to sustain his burden of proof as required by law.

Dated this 17th day of April, 1957.

/s/ **FREDERICK A. JAHNKE,**
Attorney at Law.

Service of copy acknowledged.

[Endorsed]: Filed April 22, 1957.

